SUBMITTED

TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1925

No. 292

W. W. HAY, PLAINTIFF IN ERROR,

vs.

THE MAY DEPARTMENT STORES COMPANY AND WILLIAM McCORMICK

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MISSOURI

FILED FEBRUARY 21, 1925

(30,891)

(30,891)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1925

No. 292

W. W. HAY, PLAINTIFF IN ERROR,

vs.

THE MAY DEPARTMENT STORES COMPANY AND WILLIAM McCORMICK

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MISSOURI

INDEX

	Original	Print
Record from the district court of the United States, eastern district of Missouri	1	1
Citation and service (omitted in printing)	1	1
Writ of error and return	2	1
Caption (omitted in printing)	3	2
Record from circuit court of city of St. Louis	5	2
Caption (omitted in printing)	5	2
Petition	5	2
Summons and sheriff's return	10	5
Submission of petition for removal	11	5
Notice of petition for removal	12	6
Petition for removal	13	6
Bond on removal (omitted in printing)	18	9
Order removing cause to district court	19	9
Bond on removal (omitted in printing)	20	9
Clerk's certificate	21	9
Motion to remand	23	10
Submission of motion to remand	24	10

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JULY 15, 1925

	Original	Print
Order overruling motion to remand	25	10
Bill of exceptions	27	11
Caption	27	11
Motion to remand (copy) ....(omitted in printing)..	27	11
Order settling bill of exceptions	28	11
Motion to reconsider order overruling motion to remand	30	12
Submission of motion to reconsider	31	12
Order overruling motion to reconsider	32	12
Separate amended answer of May Department Stores	34	13
Separate amended answer of Wm. McCormick	35	13
Motion that plaintiff furnish security for costs	37	13
Order to furnish security for costs	38	14
Order dismissing cause	39	14
Order allowing writ of error	40	14
Petition for writ of error	41	15
Assignment of errors	42	15
Judge's certificate to jurisdiction	43	16
Bond on writ of error ....(omitted in printing)..	45	16
Præcipe for transcript of record....(omitted in printing)..	46	
Clerk's certificate	48	16
Statement by plaintiff in error of points to be relied on and stipulation as to parts of record to be printed	49	17

[fol. 1] CITATION—In usual form showing service on Holland, Rutledge & Lashly; filed Feb. 2, 1925; omitted in printing

---

[fol. 2] **IN UNITED STATES DISTRICT COURT**

WRIT OF ERROR AND RETURN—Filed Feb. 2, 1925

UNITED STATES OF AMERICA, ss:

The President of the United States to the Honorable the Judge of the District Court of the United States for the Eastern Division of the Eastern Judicial District of Missouri, Greeting:

Because, in the records and proceedings, as also in the rendition of the judgment of a plea which is in the said District Court, before you, at the September Term, 1924, thereof, between W. W. Hay as plaintiff and The May Department Stores Company, a corporation, and William McCormick, as defendants, a manifest error hath happened, to the great damage of the said W. W. Hay, as by his complaint appears.

We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the said record and proceedings aforesaid, at the City of Washington, and filed in the office of the Clerk of the Supreme Court of the United States, on or before thirty days from date hereof, to the end that the record and proceedings aforesaid being inspected, the Supreme Court of the United States may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness, the Honorable Charles B. Davis, Judge of the District Courts of the United States within and for the Eastern District of Missouri, this second day of February in the year of our Lord one thousand nine hundred and Twenty-five.

Issued at office in the City of St. Louis, with the seal of the District Court of the United States for the Eastern Division of the Eastern Judicial District of Missouri, dated as aforesaid.

Jas. J. O'Connor, Clerk District Court United States, Eastern Division of the Eastern Judicial District of Missouri. (Seal of the United States District Court, Eastern Judicial District of Missouri.)

Allowed by Charles B. Davis, Judge.

Return to Writ

[File endorsement omitted.]

UNITED STATES OF AMERICA,
Eastern Division of the Eastern Judicial District of Missouri, ss:

In obedience to the command of the within writ, I herewith transmit to the Supreme Court of the United States, a duly certified transcript of the record and proceedings in the within entitled case, with all things concerning the same.

In witness whereof, I hereto subscribe my name, and affix the seal of said District Court, at office in the city of St. Louis, Mo., this 9th day of February, A. D., 1925.

Jas. J. O'Connor, Clerk of said Court. (Seal of United States District Court, Eastern Judicial District of Missouri.)

[fols. 3 & 4] [Caption omitted]

[fol. 5] [Caption omitted]

STATE OF MISSOURI,
City of St. Louis, ss:

In Circuit Court of City of St. Louis, State of Missouri, April Term, 1924

W. W. HAY, Plaintiff,

vs.

THE MAY DEPARTMENT STORES COMPANY, a Corporation, and WILLIAM McCORMICK, Defendants

PETITION—Filed March 22, 1924

Plaintiff states that defendant, The May Department Stores Company, now is and at all times herein mentioned was a corporation duly organized and existing under and by virtue of law, with an office and place of business in the City of St. Louis, Missouri, and in and appurtenant to its said place of business at all said times occupied, possessed and used the hereinafter mentioned tunnel and passage-[fol. 6] way, and that on or about the 18th day of January 1923, plaintiff and defendant McCormick were in the employ of defendant company, and it was the duty of plaintiff and McCormick and other employees to push and thereby move and propel loaded trucks, into and along said tunnel and passageway of defendant company; that said passageway and tunnel at all said times was strewn with debris,

waste, and other things, including carpet sweepers, and defendant company negligently caused, suffered and permitted it to be and remain in the aforesaid strewn and littered condition; that the said trucks were negligently heavily loaded by defendant company (and not by plaintiff or said McCormick), and defendant company negligently required each said employee to push one of said loaded trucks alone and unassisted, and defendant company caused and required said several employees to move and push said loaded trucks at the same time along said passageway or tunnel one behind the other and defendant company negligently suffered and permitted said trucks to be so pushed and moved with short and inadequate and unsafe space intervals between them; that defendant company negligently permitted said trucks to be so pushed and propelled with some rapidity and that when said trucks were heavily loaded as aforesaid and when said tunnel and passageway was strewn and littered with debris, waste and other things as aforesaid, it was necessary to push and propel said trucks at moderate speed in order for one person to propel the same as aforesaid, and keep the truck in motion; that said trucks and the load on them when heavily loaded as aforesaid, obstructed the view ahead of the person pushing same, and made such person less able to observe and avoid persons or things in the path of said trucks, and caused the person pushing same to be unable to see and avoid small or low objects and things in the path of the truck, and that said trucks while being pushed as afore- [fol. 7] said under the aforesaid conditions were likely to strike and be suddenly stopped by such debris, waste and other things strewn as aforesaid in said tunnel and passageway, and thereby likely to cause the person pushing such truck to be struck and injured by a truck following apace as aforesaid, and that the aforesaid heavy loads upon said trucks and aforesaid speed of such trucks made the persons pushing same less able to quickly stop such trucks to prevent such collisions, and that at and for several days prior to the time of plaintiff's injury as herein alleged, both defendants knew or by the exercise of ordinary care could have known all the aforesaid facts, circumstances, conditions, practices, dangers and likelihood of injury; that on and for several days prior to the occasion when plaintiff was injured as herein stated the defendant McCormick habitually, continuously and customarily negligently and carelessly pushed and propelled said trucks at an unusually unreasonably and unnecessarily rapid and dangerous speed that was not reasonably safe, negligently and carelessly while so doing caused and permitted the truck pushed by him to follow the person and truck ahead at an unusually, unreasonably and unnecessarily close and dangerous distance without a reasonably safe and adequate interval of space between, negligently and carelessly while so doing was inattentive to the conditions and persons ahead of and in the path of his truck and failed to exercise reasonable care to observe and avoid collision with persons ahead as aforesaid; that on and for several days prior to the time when plaintiff was injured as herein stated both defendants knew or by the exercise of ordinary care could have known of the aforesaid negligent and dangerous habits of defendant McCormick; that on said day

pursuant to the aforesaid duties while plaintiff was pushing one of the aforesaid heavily loaded trucks along said tunnel and passageway said truck struck and was suddenly and abruptly stopped by the aforesaid obstructions of said tunnel and passageway and the [fol. 8] heavily loaded truck immediately following plaintiff negligently close as aforesaid and being pushed and propelled by defendant McCormick at negligent and rapid speed as aforesaid thereupon immediately struck and collided with plaintiff; that defendants negligently failed to stop or divert the truck so as to avoid said collision and injuries and defendant McCormick was not a reasonably safe co-employee to work with or about plaintiff; that the aforesaid methods and practices of defendants were negligently dangerous and not reasonably safe, that defendants negligently caused and permitted said truck that struck plaintiff as aforesaid to run and be propelled at a negligent, unnecessarily fast and dangerous rate of speed as aforesaid and at an unnecessarily close and dangerous distance behind plaintiff and was not reasonably safe, likely to cause injury as aforesaid, and defendant company negligently caused and permitted defendant McCormick to continue to perform his aforesaid duties in the aforesaid negligent, unsafe and dangerous manner, habitually and customarily as aforesaid, likely to injure plaintiff as aforesaid, all of which defendant company, as well as defendant McCormick, knew or by the exercise of ordinary care could have known in time by the exercise of reasonable care to have avoided plaintiff's injuries as aforesaid; that the negligence of both defendants as aforesaid concurred and jointly cooperated to cause, and did directly and proximately cause, the aforesaid collision and the following injuries sustained by plaintiff as aforesaid, to-wit:

His left leg, left ankle and left foot and the skin, muscles, tendons, ligaments, nerves, tissues and bones thereof were bruised, contused, wrenched sprained, dislocated swollen, inflamed, infected and fractured, and his nervous system was severely shocked; that all said [fol. 9] injuries are serious and permanent and the functional use of said left leg, left ankle and left foot have been greatly and permanently weakened, impaired, destroyed and rendered painful and deformed and crippled; that plaintiff has suffered, is suffering and will in the future continue to suffer great bodily pain and mental anguish; that plaintiff's inability to walk or work has been greatly and permanently weakened and impaired, and that plaintiff has lost and will in the future continue to lose all or the greater portion of the earnings of his labor at which he was able to earn at the time of accident the sum of Twenty Dollars ($20.00) per week; that plaintiff has incurred and become liable for medical attention in the sum of One Hundred Fifty Dollars ($150.00) and will in the future be required to spend money for necessary medical and surgical attention, and plaintiff has been injured and damaged in the manner aforesaid in the sum of Fifteen Thousand Dollars ($15,000.00).

Wherefore, plaintiff prays judgment against defendants in the sum of Fifteen Thousand Dollars ($15,000.00) and for his costs in this behalf expended.

Mark D. Eagleton, Attorney for Plaintiff.

[fol. 10] IN CIRCUIT COURT OF CITY OF ST. LOUIS

SUMMONS AND SHERIFFS' RETURN

The State of Missouri to the Sheriff of the City of St. Louis, Greeting:

We command you to summon: The May Department Stores Company, a corporation, and William McCormick, to appear before the Judges of our Circuit Court, on the first day of the next term thereof, to be held in the City of St. Louis, at the Court House in said City, on the first Monday of April next, then and there to answer the complaint of W. W. Hay as set forth in the annexed petition; and have yea then and there this writ:

Witness John Schmoll, Clerk of our said Court, with the seal thereto affixed, at office in the City of St. Louis, this 22nd day of March in the year of our Lord nineteen hundred and twenty-four.

John Schmoll, Clerk. (Seal.)

Served this writ in the City of St. Louis, Missouri on the within named defendant the May Department Stores Company (a Corporation), this 22 day of March 1924 by delivering a copy of the writ and petition as furnished by the Clerk to S. B. Butler Secy of the [fol. 11] said defendant Corporation, he being in said defendants usual business office and in charge thereof. The President or other Chief Officer of said Defendant could not be found in the City of St. Louis at the time of service.

Geo. W. Strodtman, Sheriff, by W. H. Bushmann, Deputy.

I further executed this writ in the City of St. Louis, Missouri, this 22 day of March 1924 by delivering a copy of the writ as furnished by the Clerk to William McCormick defendant herein.

Geo. W. Strodtman, Sheriff, by W. H. Bushmann, Deputy.

Fee $2.00.

IN CIRCUIT COURT OF CITY OF ST. LOUIS

77150-B

W. W. HAY

vs.

THE MAY DEPARTMENT STORES COMPANY, A CORPORATION, AND WILLIAM MCCORMICK

SUBMISSION OF PETITION FOR REMOVAL—April 9, 1924

Now at this day comes the defendant The May Department Stores Company, a corporation, by its attorneys and files and submits to

the Court its notice, verified petition and bond praying for an order removing this cause to the District Court of the United States for the Eastern Division of the Eastern Judicial District of Missouri, and the Court having seen and examined said notice, petition and bond, and not being sufficiently advised of and concerning the premises takes time to consider thereof.

[fol. 12] IN CIRCUIT COURT OF CITY OF ST. LOUIS

[Title omitted]

NOTICE OF REMOVAL PETITION

To the above-named plaintiff or his attorney:

You are hereby notified that on the 9th day of April, 1924, The May Department Stores Co., one of the above-named defendants will file in the Circuit Court, City of St. Louis, Missouri, a removal petition and removal bond for the purpose of removing the above cause to the District Court of the United States for the Eastern Division of the Eastern Judicial District of Missouri.

And you are further notified that the said defendant will on said day, at ten o'clock a. m., or as soon thereafter as it may be heard, pray said Circuit Court, City of St. Louis, Missouri, to approve said bond and to accept the surety thereof and to order removal as prayed in said petition to said District Court of the United States for the Eastern Division of the Eastern Judicial District of Missouri. Copies of said removal petition and bond are hereto attached.

The May Department Stores Company, by Holland, Rutledge & Lashly, Its Attorneys.

The undersigned, plaintiff in the above cause, hereby acknowledges that a copy of the above notice was duly served upon him this 5th day of April, 1924.

W. W. Hay, by Mark D. Eagleton, His Attorney.

[fol. 13] IN CIRCUIT COURT OF CITY OF ST. LOUIS

[Title omitted]

REMOVAL PETITION OF THE MAY DEPARTMENT STORES COMPANY

Now comes your petitioner, The May Department Stores Company, one of the above named defendants, and appearing solely for the purpose of this motion, and for no other purpose, files its petition for the removal of the above entitled cause to the District Court of the United States in and for the Eastern Division of the Eastern Judicial District of Missouri, and respectfully shows to the Court that this is a civil action at law, being a suit brought by the above

named plaintiff against the above named defendants to recover for alleged personal injuries which the said plaintiff claims in said suit were caused by the alleged negligence of the said defendants.

Petitioner states that there is in said cause a separable controversy which is wholly between citizens of different states, to-wit, between the plaintiff in said cause, who was at the time of the commencement of said suit, ever since has been and still is a citizen of the State of Missouri and a resident of said state, and your petitioner, The May Department Stores Company, one of the defendants in the above cause, which was at the time of the commencement if said suit, ever since has been and still is a corporation organized under the laws of the State of New York, a citizen of said State, a resident of said State and a non-resident of the State of Missouri.

[fol. 14] And your petitioner states that the matter and amount in dispute in said cause, and in said separable controversy, exceeds exclusive of interest and costs the sum or value of Three Thousand Dollars, ($3,000.00). And your petitioner further shows that the time within which your petitioner is required by the laws of the State of Missouri and by the rules of this Court to answer or plead in said cause has not yet expired.

And your petitioner states that said separable controversy between said plaintiff and your petitioner is as follows:

That while plaintiff has joined in said cause as a defendant one William McCormick, a resident of the State of Missouri, and while said petition recites that the injuries alleged to have been sustained by plaintiff were due to negligence on the part of both defendants, yet the petition shows upon its face that there is a separable controversy, in said cause between said plaintiff and your petitioner, said separable controversy being as follows:

Plaintiff alleges that he was in the employ of The May Department Stores Company and the co-defendant, William McCormick, was also in the employ of said Company, and the petition shows upon its face that the plaintiff and said resident defendant were clearly and obviously fellow servants, in that both of them at the time of the alleged accident were pushing trucks in the tunnel while in the employ of your petitioner.

That while the petition alleges that The May Department Stores Company was negligent in certain particulars and the resident defend was negligent in certain other particulars, it appears upon the face of the plaintiff's petition that the acts of alleged negligence on the part of your petitioner do not affect said resident defendant, and the acts of negligence pleaded against the resident defendant [fol. 15] do not affect your petitioner. Generally stated, plaintiff alleges that while the plaintiff and the resident defendant were pushing two trucks, that of the resident defendant being behind that of the plaintiff, the resident defendant did cause his truck to be pushed against the plaintiff.

Plaintiff alleges that said accident was due to negligence on the part of your petitioner in failing to furnish plaintiff a reasonable safe place in which to work, in that your petitioner alleged the tunnel to have obstructions in it, in that your petitioner caused the

trucks to be heavily loaded, in that it caused each of said employes to push one of said trucks alone and unassisted, and that your petitioner suffered and permitted said trucks to be pushed and moved at inadequate and unsafe intervals with rapidity; and in that the resident defendant was habitually negligent in the manner in which he pushed his trucks and that your petitioner knew or might have known of such habitual negligence.

As against the individual defendant, plaintiff alleges that the accident was due to negligence on the part of the resident defendant in that he moved his truck at too rapid a rate and moved it along too close to plaintiff, and in that the resident defendant "negligently failed to stop and divert the truck so as to avoid said collision and injuries."

Plaintiff's petition shows that the alleged acts of negligence charged against your petitioner do not affect the resident defendant and vice versa and no joint cause of action is stated against said defendants. Petition further discloses that none of the acts of negligence alleged against your petitioner were the proximate cause of the collision between the truck which plaintiff was pushing and the truck which was being pushed by the resident defendant. On the contrary, it appears from the face of the petition that the proximate cause and [fol. 16] the sole proximate cause of the accident was as follows:

That the plaintiff while handling his truck stopped the same and thereafter the resident defendant negligently failed to stop or divert his truck so as to avoid a collicion. This averment means only, and can mean only, that the resident defendant saw or by the exercise of ordinary care would have seen the truck of plaintiff stop and thereafter failed to exercise ordinary care to stop or divert the truck which the resident defendant was pushing. No matter what the surroundings were and no matter what alleged previous negligence your petitioner may have been guilty of, if the resident defendant saw or by the exercise of ordinary care would have seen the plaintiff and saw or by the exercise of ordinary care would have seen the truck which plaintiff was pushing stop, in time to have avoided the collision, his failure to do so would obviously be the sole proximate cause of the collision and of plaintiff's alleged injuries. Hence no joint cause of action is stated against said defendants.

And your petitioner offers herewith a bond of good and sufficient surety for its entering in the District Court of the United States for the Eastern Division of the Eastern Judicial District of Missouri, within thirty days from the date of filing this petition, a certified copy of the record in said cause, and for paying all costs that may be awarded by said District Court, if said Court shall hold that this cause was wrongfully or improperly removed thereto.

Wherefore, your petitioner prays this Honorable Court to proceed no further herein, except to make the order of removal required by law, and to approve said surety and bond, and to cause the record herein to be removed into the District Court of the United States

The May Department Stores Company, by Robt. A. Holland, Jr., Agent. Holland Rutledge & Lashly, Attorneys for Petitioner.

[fol. 17] Sworn to by Robt. A. Holland. Jurat omitted in printing.

[fol. 18] Bond on Removal for $500—Omitted in printing

[fol. 19] In Circuit Court of City of St. Louis

[Title omitted]

Order Removing Cause—April 12, 1924

The notice, petition and bond of defendant The May Department Stores Company, a corporation for removal of this cause to the District Court of the United States for the Eastern Division of the Eastern Judicial District of Missouri having been filed and submitted to the Court on the 9th day of April, 1924, and having been taken under advisement, and the Court now at this day being fully advised of and concerning the premises doth order that the prayer of said petition be granted and that said bond in the sum of $500.00 with the Columbia Casualty Company as surety be approved which is now accordingly done.

Thereupon it is ordered by the Court that the Clerk of this Court forthwith certify for entering in the District Court of the United States for the Eastern Division of the Eastern Judicial District of Missouri, a copy of the record in the above entitled cause, as fully as the same remains on file and of record in this Court; that no further proceedings be had in this suit in this Court.

[fol. 20] Bond on Removal for $500—Approved and filed April 12, 1924; omitted in printing

---

[fols. 21 & 22] In Circuit Court of City of St. Louis

Clerk's Certificate

I, John Schmoll, Clerk of the Circuit Court, City of St. Louis, within and for the City and State aforesaid, certify the above and foregoing to be a full, true and complete transcript of the record and proceedings in the above entitled cause, including the notice, petition and bond for removal, acceptance of said petition and bond and the order of removal, as fully as the same remains on file and of record in my office.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court, at office, in the City of St. Louis, this 23rd day of April, 1924.

(Sgd.) John Schmoll, Clerk Circuit Court. (Seal.)

[fol. 23] IN UNITED STATES DISTRICT COURT

MOTION TO REMAND CAUSE TO STATE COURT—Filed May 2, 1924

Now comes plaintiff in this cause and respectfully states and shows to the court that this suit was originally instituted in the Circuit Court of the City of St. Louis, Missouri, and that defendant May Department Stores Company, thereafter filed in said Circuit Court of the City of St. Louis, Missouri, a petition for removal of this cause to this court, and a bond therewith, and that said defendant has since filed in this court a transcript of the record of this cause in said Circuit Court of the City of St. Louis, Missouri, and that it manifestly appears upon the face of the record in this cause that this suit and action is not within the jurisdiction of this court, and that said petition for removal filed by said defendant does not state facts sufficient to constitute, justify or effectuate a removal of the cause to this court from said Circuit Court of the City of St. Louis, Missouri, and that this court has never acquired lawful jurisdiction of this cause and that it should be remanded by this court to the above named court from which it purports to have been removed.

Wherefore, plaintiff respectfully prays that this court remand this cause to the Circuit Court of the City of St. Louis, Missouri, and that this court divest itself of any and all jurisdiction thereof.

(Signed) Mark D. Eagleton, Attorney for Plaintiff.

[fol. 24] IN UNITED STATES DISTRICT COURT

SUBMISSION OF MOTION TO REMAND—May 5, 1924

Now on this day come the parties in the above entitled cause by their respective attorneys and submit to the court, on briefs to be hereafter filed, the motion of plaintiffs to remand this cause to the Circuit Court, City of St. Louis, Missouri.

[fols. 25 & 26] IN UNITED STATES DISTRICT COURT

ORDER OVERRULING MOTION TO REMAND—May 29, 1924

Now on this day the court having considered the motion of plaintiff to remand this cause to the Circuit Court, City of St. Louis, Missouri, being fully advised in the premises, doth

Order that said motion be and the same is hereby overruled.

[fol. 27] **Plaintiff's Term Bill of Exceptions**—Filed June 14, 1924

CAPTION

Be it remembered, that in this cause at the March Term, A. D. 1924, of the Court, the Honorable Charles B. Davis, Judge, presiding, the following proceedings were had, to-wit:

On the second day of May, 1924, plaintiff filed motion to remand the cause to the state court, said motion being in words and figures as follows:

"STATE OF MISSOURI,
City of St. Louis, ss:

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DIVISION OF THE EASTERN JUDICIAL DISTRICT OF MISSOURI, MARCH TERM, 1924

No. 6716

W. W. HAY, Plaintiff,

vs.

THE MAY DEPARTMENT STORES COMPANY, and WILLIAM McCORMICK, Defendants

MOTION TO REMAND CAUSE TO STATE COURT—omitted; printed side page 23, ante

---

[fols. 28 & 29] Thereafter during said Term on the 29th day of May, 1924, the court having considered said motion, overruled the same and denied the motion and refused to remand said cause to the state court as prayed in said motion, to which action, ruling and order of the court plaintiff duly excepted and excepts.

ORDER SETTLING BILL OF EXCEPTIONS

And now in furtherance of justice and that right may be done, the plaintiff tenders and presents the foregoing as his Bill of Exceptions in this cause to the action and ruling of the court, and prays that the same may be settled and allowed and signed and sealed by the court and made a part of the record, and the same is accordingly done this 14th day of June, 1924, during this March Term 1924 of the Court.

(Signed) Charles B. Davis, District Judge Holding the District Court of the United States for the Eastern Division of the Eastern Judicial District of Missouri.

Approved: (Sgd.) Holland, Rutledge & Lashley, Attorneys for Defendants.

[fol. 30] IN UNITED STATES DISTRICT COURT

MOTION TO RECONSIDER ORDER OVERRULING MOTION TO REMAND—Filed July 2, 1924

Comes now the plaintiff and respectfully moves the court for reconsideration of its order overruling plaintiff's motion to remand this cause to the state court, on the grounds, now assigned for error:

1. That the court is in error in overruling said motion.

2. That the record shows that this court has not jurisdiction of this cause.

3. That the court is in error in holding that there is, in this cause a separable controversy authorizing removal or giving this court jurisdiction.

Respectfully, (Sgd.) Mark D. Eagleton, Attorney for Plaintiff.

[fol. 31] IN UNITED STATES DISTRICT COURT

SUBMISSION OF MOTION TO RECONSIDER—July 7, 1924

Now on this day come the parties in the above entitled cause by their respective attorneys and submit to the court the motion of plaintiff for re-consideration of the order heretofore entered overruling his motion to remand this cause to the Circuit Court, City of St. Louis, Missouri.

[fols. 32 & 33] IN UNITED STATES DISTRICT COURT

ORDER OVERRULING MOTION TO RECONSIDER—Sept. 5, 1924

Now on this day the Court having considered the motion of plaintiff for a reconsideration of the order heretofore entered in this cause overruling his motion to remand this cause to the Circuit Court, City of St. Louis, Missouri, being fully advised in the premises, doth

Order that said motion of plaintiff for reconsideration of said order be and said motion is hereby overruled.

[fol. 34] IN UNITED STATES DISTRICT COURT

[Title omitted]

SEPARATE ANSWER OF DEFENDANT THE MAY DEPARTMENT STORES COMPANY—Filed April 28, 1924

Now comes said defendant and for its separate answer to the petition of plaintiff filed herein denies each and every allegation in said petition contained.

Further answering said defendant states that whatever injuries, if any, were sustained by plaintiff on the occasion mentioned in his petition were caused by the negligence of plaintiff directly contributing thereto.

Wherefore, having fully answered, defendant prays to be hence dismissed with its costs.

(Sgd.) Holland, Rutledge & Lashly, Attorneys for Defendant The May Department Stores Company.

[fols. 35 & 36] IN UNITED STATES DISTRICT COURT

SEPARATE ANSWER OF DEFENDANT WILLIAM MCCORMICK—Filed April 28, 1924

Now comes said defendant and for his separate answer to the petition of plaintiff filed herein denies each and every allegation in said petition contained.

Further answering, said defendant states that whatever injuries, if any, were sustained by plaintiff on the occasion mentioned in his petition were caused by the negligence of plaintiff directly contributing thereto.

Wherefore, having fully answered, defendant prays to be hence dismissed with his costs.

(Sgd.) Holland, Rutledge & Lashly, Attorneys for Defendant William McCormick.

[fol. 37] IN UNITED STATES DISTRICT COURT

MOTION FOR SECURITY FOR COSTS—Filed October 16, 1924

Now comes defendant in the above cause and moves the Court for an order on plaintiff to deposit security for costs herein.

And for grounds of its said motion defendant assigns that the plaintiff has no property within the jurisdiction of this Court out of which the costs of said case could be collected upon execution.

And defendant further assigns that the plaintiff's attorneys, prior to the institution of this suit, entered into a contract with the above named plaintiff to prosecute the said suit upon a contingent basis, and that said attorneys claim a lien for such fee under the Statute of Missouri in that behalf enacted.

(Sgd.) Holland, Rutledge & Lashly, Attorneys for Defendant.

Sworn to by M. P. Phillips. Jurat omitted in printing.

[fol. 38] IN UNITED STATES DISTRICT COURT

ORDER TO FURNISH SECURITY FOR COSTS—NOV. 3, 1924

Now on this day come the parties in the above entitled cause by their respective attorneys and submit to the Court the motion of defendants to require plaintiff to furnish security for costs herein; and the Court being now fully advised in the premises doth order that said motion of defendants be and it is hereby sustained, and that plaintiff be and he is hereby Ordered to deposit the sum of Fifty Dollars ($50.00) in cash, or give a cost bond in the sum of Two Hundred Dollars ($200.00) within ten days from this date.

[fol. 39] IN UNITED STATES DISTRICT COURT

ORDER DISMISSING CAUSE—NOV. 14, 1924

Now on this day it appearing to the Court that plaintiff was heretofore ruled to furnish security for costs in this cause, and plaintiff has wholly failed to comply with such rule, it is, thereupon, Ordered that this cause be and the same is hereby dismissed because of such failure of plaintiff, at his costs.

[fol. 40] IN UNITED STATES DISTRICT COURT

ORDER ALLOWING WRIT OF ERROR—Feb. 2, 1925

Now on this day comes plaintiff in the above entitled cause and files herein his petition praying for the allowance of a writ of error to the Supreme Court of the United States, together with his assignment of errors, upon consideration whereof it is ordered that said writ of error be allowed as prayed upon plaintiff giving bond for costs in the sum of $250.00, and plaintiff is granted ten (10) days from this date within which to present such bond.

And now a citation is issued to defendants, citing and admonishing them to be and appear in said Supreme Court of the United

States, thirty (30) days from and after this date, which citation is duly acknowledged by attorneys for defendants, and filed.

And now the certificate of Honorable Charles B. Davis, Judge of this Court, as to the jurisdictional question involved herein and passed upon by said judge, is filed.

[fol. 41] IN UNITED STATES DISTRICT COURT

PETITION FOR WRIT OF ERROR—Filed February 2, 1925

Now comes W. W. Hay, plaintiff herein and says:

That on or about the 14th day of November, 1924, this District Court entered a judgment herein in favor of defendants and against this plaintiff, in which judgment and the proceedings had prior thereto in said cause, certain errors were committed to the prejudice of this plaintiff, all of which relate to a question of jurisdiction of this court as a federal court and all of which will more in detail appear from the assignment of Errors which is filed with this petition.

Wherefore, this plaintiff prays that a Writ of Error may issue in this behalf out of the Supreme Court of the United States for the correction of the errors so complained of, and that a transcript of the record, proceedings and papers in this cause, duly authenticated may be sent to the Supreme Court of the United States for review and that said question of jurisdiction alone be certified to said Supreme Court for decision.

(Signed) Mark D. Eagleton, Attorneys for Plaintiff.

[fol. 42] IN UNITED STATES DISTRICT COURT

ASSIGNMENT OF ERRORS—Filed February 2, 1925

Now comes plaintiff herein and in connection with his petition for Writ of Error filed herewith, and as and for his Assignment of Errors, says that in the said record and proceedings there is manifest error, in this, to-wit:

First. The court erred in dismissing the cause, instead of remanding it to the state court.

Second. The court erred in overruling plaintiff's motion to remand the cause to the state court, and in refusing to so remand it.

Third. The Court erred in holding that it had jurisdiction of the cause.

Fourth. The court erred in holding that there is a separable controversy authorizing removal and giving the court jurisdiction.

Wherefore, plaintiff prays that said judgment be reversed.
(Signed) Mark D. Eagleton, Attorney for Plaintiff.

[fols. 43 & 44] In United States District Court

Judge's Certificate of Question of Jurisdiction—Filed February 2, 1925

In this cause it is hereby certified that the jurisdiction of this court as a Federal Court is in issue, and that in overruling the motion to remand and in entering judgment of dismissal, it was decided and adjudged that this court acquired jurisdiction by removal based upon a separable controversy under Section 28 of the Judicial Code, and that such separable controversy is shown by the record in this cause and it was decided that this court has jurisdiction by virtue thereof; It is further certified that said question of jurisdiction was decided solely upon the record and that no testimony or evidence was heard or considered.

Wherefore, said question of jurisdiction alone is hereby certified to the Supreme Court of the United States for decision, pursuant to Section 238 of the Judicial Code.

Signed, sealed and made a part of the record this 2nd day of February, 1925, in the September Term 1924 of the court.
(Signed) Charles B. Davis, District Judge Holding the District Court of the United States for the Eastern Division of Eastern Judicial District of Missouri.

[fols. 45-47½] Bond on Writ of Error for $250—Approved and filed Feb. 3, 1925; omitted in printing

---

[fol. 48] In United States District Court

Clerk's Certificate

I, Jas. J. O'Connor, Clerk of the District Court of the United States, in and for the Eastern Division of the Eastern Judicial District of Missouri, Do Hereby Certify, that the foregoing is a full, true and complete transcript of the record and proceedings in Cause No. 6716, At Law, wherein W. W. Hay is plaintiff, and The May Department Stores Company, a corporation, and William McCormick, are defendants, (except insofar as the same is restricted by the pracipe for transcript of the record heretofore set out), as fully as the same remains on file and of record in my office, and that the original Citation and Writ of Error are hereto attached and herewith returned.

In witness whereof, I hereunto subscribe my name and affix the seal of said Court at office in the City of St. Louis, in the Eastern Division of said District, this 9th day of February, in the year of our Lord nineteen hundred and twenty-five.

Jas. J. O'Connor, Clerk of said Court, by Joseph N. Walsh, Deputy. (Seal of United States District Court, Eastern Juricial District of Missouri.)

[fol. 49] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1924

STATEMENT BY PLAINTIFF IN ERROR OF POINTS TO BE RELIED ON AND STIPULATION OF PARTS OF THE RECORD TO BE PRINTED—Filed Feb. 21, 1925

The only points on which the plaintiff in error in this cause will rely are that the court below, that is, the District Court of the United States for the Eastern Division of the Eastern Judicial District of Missouri, did not have jurisdiction of the cause wherein the judgment was rendered from which this writ of error is prosecuted, and that said court erred for that reason in dismissing said cause and in not remanding said cause to the state court from which it was removed.

Plaintiff in error states that he thinks that all of the record of the proceedings below is or may be necessary for the consideration of the above points except the following portions of said record, to-wit:

1. The index prepared by the clerk of the State Court and which accompanied the transcript of the record of said State Court, which was transmitted to and filed in the District Court of the United States:

2. The joint præcipe for transcript on writ of error and election as to printing, filed in the District Court by Plaintiff in error.

James J. O'Donohoe, Mark D. Eagleton, Harry S. Rooks, Attorneys for Plaintiff in Error.

[fol. 50] The defendants in error agree that the items mentioned within may be omitted from printed record and acknowledge service of a true copy hereof, this 17th day of February, 1925.

Robt. A. Holland, Jr., Thos. G. Rutledge, Jacob M. Lashly, Attorneys for Defendants in Error.

[fol. 51] [File endorsement omitted.]

Endorsed on cover: File No. 30,891. E. Missouri D. C. U. S. Term No. 292. W. W. Hay, plaintiff in error, vs. The May Department Stores Company and William McCormick. Filed February 21, 1925. File No. 30,891.

FILED
JAN 18 1926
WM. R. STANSBURY
Clerk

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1925.

W. W. HAY,
Plaintiff in Error,
v.
THE MAY DEPARTMENT STORES COMPANY, a Corporation,
and
WILLIAM McCORMICK,
Defendants in Error.

No. 292.

In Error to the District Court of the United States for the Eastern Division of the Eastern District of Missouri.

BRIEF OF PLAINTIFF IN ERROR.

JAMES J. O'DONOHOE,
MARK D. EAGLETON,
HARRY S. ROOKS,
Attorneys for Plaintiff in Error.

St. Louis Law Printing Co., 415 North Eighth Street. Central 4477.

SUBJECT INDEX.

	Page
Table of cases	ii
Statutes and texts	iii
(b) No opinion was delivered in the court below	1
(c) Jurisdiction of this Court	2
(d) Statement of the case	4
Plaintiff's petition filed in State Court	4-8
Judge's certificate of question of jurisdiction	11
(e) Assignment of errors	12
(f) Summary of argument	13-17
Argument	18
I. Separable controversy	18
II. Joint cause of action stated, habitual negligence	22
III. Joint liability for concurring negligence	27
IV. Proximate cause and joint liability	32
V. Proximate cause as question of fact	46
VI. Statutory right to sue jointly	47
VII. Pleading negligence	48

Table of Cases.

(Note—Where official citation is not given, the case has not been and will not be officially reported.)

Page

Alabama Great S. Ry. Co. v. Thompson, 200 U. S. 206 ..... 13, 18

Brown v. Kansas Nat. Gas Co., 299 Fed. 463 (8th C. C. A.) 16, 34

Brunski v. Ford Motor Co. et al., 299 Fed. 807 (Mo.) 13, 15, 18, 28

Burns v. R. L. McDonald Mfg. Co., 213 Mo. App. 640 ..... 14, 23

Carr v. St. Louis Auto Supply Co., 293 Mo. 562 .. 15, 28, 30

Charman v. Railroad et al., 105 Fed. 449 ..... 13, 18, 20

Ches. & Ohio Ry. Co. v. Dixon, 179 U. S. 131 ..... 13, 18

Chicago & Alton Ry. Co. v. McWhirt, 243 U. S. 422 .. 13, 18

Chicago, B. & Q. Ry. Co. v. Willard, 220 U. S. 413 .. 13, 18

Chicago, R. I. & Pac. Ry. Co. v. Dowell, 229 U. S. 102 ..... 13, 15, 18, 19, 28, 33

Chicago, R. I. & Pac. Ry. Co. v. Schwyhart, 227 U. S. 184 ..... 13, 18

Cincinnati, N. O. & Tex. Pac. Ry. Co. v. Bohon, 200 U. S. 221 ..... 13, 18

Ellis v. N. Y., Lake Erie & W. R. Co., 95 N. Y. 546 ..... 16, 34, 44

Houston & T. C. Ry. Co. v. Kelly, 35 S. W. 878 (Tex. Civ. App. 1896) 16, 34, 46

Kersey v. Kansas C., St. J. & C. B. R. Co., 79 Mo. 362 ..... 14, 23, 26

Kreigh v. Westinghouse, Church, Kerr & Co., 214 U. S. 249 ..... 15, 34, 37

McAllister v. Ches. & Ohio Ry. Co., 243 U. S. 302 ... 13, 18

Miller v. United Rys. Co. et. al., 155 Mo. App. 528 ..... 15, 28, 29

Milwaukee & St. P. Ry. Co. v. Kellogg, 94 U. S. 469. 16, 46

Moriarity v. Scharzschild & Sulzberger Co., 132 Mo. App. 650 ..... 15, 34, 39
Morin v. Rainey et al., 207 S. W. 858 (Mo. St. Louis Ct. App. 1919) 15, 28, 29
New Jersey & N. Y. R. Co. v. Young, 49 Fed. 723, 1 C. C. A. 428 ..... 16, 34, 42
Pittsburgh Rys. Co. v. Thomas, 174 Fed. 591, 98 C. C. A. 437 ..... 14, 23
Richardson v. Power Co. et al., 209 Fed. 949 ..... 13, 18, 21
Root v. K. C. Southern Ry. Co., 195 Mo. 348 ..... 16, 34, 43
Rueter v. Terminal R. R. Assn., 261 S. W. 713 (Mo. St. Louis Ct. App. 1924) 17, 48
Schuh v. American Car & Fdy. Co., 241 S. W. 641 (Mo. St. Louis Ct. App. 1922) 16, 34
Shapir v. Sieben, 233 S. W. 419 (Mo. Sup. Court in banc, July, 1921) 16, 34
Smith v. Greer, 216 Mo. App. 155 ..... 16, 34
Smith v. Fordyce, 190 Mo. 1 ..... 15, 28, 31
Southern Ry. Co. v. Carson, 194 U. S. 136 ..... 13, 18
Southern Ry. Co. v. Miller, 217 U. S. 209 ..... 13, 18
Standard Oil Co. v. Brown, 218 U. S. 78 ..... 15, 34, 36
Sustar v. Bambrick Bros. Const. Co., 179 Mo. App. 495 ..... 14, 23, 24
Union Pac. Ry. Co. v. Callaghan, 56 Fed. 988, 6 C. C. A. 205 ..... 15, 34, 40
Vaughn v. Meier, 246 S. W. 279 (Mo. Sup. 1922) . 16, 34, 44
Wallin v. Eastern Ry. Co. of Minn., 83 Minn. 149 . . 16, 34, 45
Wilson v. Republic Iron & St. Co., 257 U. S. 92 3
Young v. The Shickle, H. & H. Co., 103 Mo. 324 ..... 15, 34

Statutes.

Missouri Revised Stat. 1919, Vol. 1, sec. 1160, p. 483 . 17, 47

Texts.

Cooley, "Torts," 3rd Ed. 1906, Vol. 1, p. 247 29
Encyclopedia of Pl. & Prac., Vol. 15, pp. 557, 558, 559 28

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1925.

W. W. HAY,
Plaintiff in Error,

v.

THE MAY DEPARTMENT STORES COMPANY, a Corporation,

and

WILLIAM McCORMICK,
Defendants in Error.

No. 292.

In Error to the District Court of the United States for the Eastern Division of the Eastern District of Missouri.

BRIEF OF PLAINTIFF IN ERROR.

(1)

No opinion was delivered in the court below.

(c)

JURISDICTION OF THIS COURT.

1. The judgment to be reviewed was rendered on November 14th, 1924 (R. 14). It was a final judgment dismissing the cause for failure of plaintiff to furnish security for costs in compliance with a previous rule made upon plaintiff to do so. It included a judgment against the plaintiff for costs.

2. The Court below held that it had jurisdiction of the cause, acquired by removal from a state court based upon an alleged separable controversy in which there was a diversity of citizenship between the plaintiff and the corporation defendant, although there was no complete diversity of citizenship. The plaintiff below claimed that there was no such separable controversy and that the Court did not have jurisdiction and had acquired none by removal, and the plaintiff filed a motion to remand the cause to the state court which was overruled and denied (R. 10) and the plaintiff's motion to reconsider the same was overruled (R. 12). The sole question of jurisdiction is certified to this court (R. 16).

3. The jurisdiction of this court is invoked under Section 238 of the Judicial Code as it existed prior to the repealing act of February 13th, 1925 (43 Stat. 941), effective in May, 1925. In this case the writ of error was al-

lowed February 2nd, 1925 (R. 1), and the record was filed in this court February 21st, 1925.

4. **Wilson v. Republic Iron & Steel Co., 257 U. S. 92,** and cases therein cited, sustain the jurisdiction of this court.

(d)

STATEMENT OF THE CASE.

On March 22, 1924, the plaintiff in error as plaintiff filed in the Circuit Court of the City of St. Louis, Missouri, a petition instituting suit against defendants in error, the May Department Stores Company, a corporation, and William McCormick, as joint defendants, to recover damages for bodily injuries therein alleged to have been caused by joint negligence of the defendants, and $15,000.00 damages was prayed (R. 2). For convenience of the Court plaintiff's said petition is here set out (omitting allegations of injuries) as follows:

Plaintiff's Petition Filed in the State Court.

"State of Missouri, } ss.
City of St. Louis. }

In Circuit Court of City of St. Louis, State of Missouri, April Term, 1924.

W. W. Hay,
Plaintiff,
v.
The May Department Stores Company, a Corporation, and William McCormick,
Defendants.

Petition—Filed March 22, 1924.

"Plaintiff states that defendant, The May Department Stores Company, now is and at all times herein

mentioned was a corporation duly organized and existing under and by virtue of law, with an office and place of business in the City of St. Louis, Missouri, and in and appurtenant to its said place of business at all said times occupied, possessed and used the hereinafter-mentioned tunnel and passageway, and that on or about the 18th day of January, 1923, plaintiff and defendant McCormick were in the employ of defendant company, and it was the duty of plaintiff and McCormick and other employes to push and thereby move and propel loaded trucks into and along said tunnel and passageway of defendant company; that said passageway and tunnel at all said times was strewn with debris, waste and other things, including carpet sweepers, and defendant company negligently caused, suffered and permitted it to be and remain in the aforesaid strewn and littered condition; that the said trucks were negligently heavily loaded by defendant company (and not by plaintiff or said McCormick), and defendant company negligently required each said employe to push one of said loaded trucks alone and unassisted, and defendant company caused and required said several employes to move and push said loaded trucks at the same time along said passageway or tunnel one behind the other and defendant company negligently suffered and permitted said trucks to be so pushed and moved with short and inadequate and unsafe space intervals between them; that defendant company negligently permitted said trucks to be so pushed and propelled with some rapidity and that when said trucks were heavily loaded as aforesaid and when said tunnel and passageway was strewn and littered with debris, waste and other things as aforesaid, it was necessary to push and propel said trucks at moderate speed in

order for one person to propel the same as aforesaid, and keep the truck in motion; that said trucks and the load on them when heavily loaded as aforesaid, obstructed the view ahead of the person pushing same, and made such person less able to observe and avoid persons or things in the path of said trucks, and caused the person pushing same to be unable to see and avoid small or low objects and things in the path of the truck, and that said trucks, while being pushed as aforesaid under the aforesaid conditions were likely to strike and be suddenly stopped by such debris, waste and other things strewn as aforesaid in said tunnel and passageway, and thereby likely to cause the person pushing such truck to be struck and injured by a truck following apace as aforesaid, and that the aforesaid heavy loads upon said trucks and aforesaid speed of such trucks made the persons pushing same less able to quickly stop such trucks to prevent such collisions, and that at and for several days prior to the time of plaintiff's injury as herein alleged, both defendants knew or by the exercise of ordinary care could have known all the aforesaid facts, circumstances, conditions, practices, dangers and likelihood of injury; that on and for several days prior to the occasion when plaintiff was injured as herein stated the defendant McCormick habitually, continuously and customarily, negligently and carelessly pushed and propelled said trucks at an unusually, unreasonably and unnecessarily rapid and dangerous speed that was not reasonably safe, negligently and carelessly while so doing caused and permitted the truck pushed by him to follow the person and truck ahead at an unusually, unreasonably and unnecessarily close and dangerous distance without a reasonably safe and adequate interval of space

between, negligently and carelessly while so doing was inattentive to the conditions and persons ahead of and in the path of his truck and failed to exercise reasonable care to observe and avoid collision with persons ahead as aforesaid; that on and for several days prior to the time when plaintiff was injured as herein stated both defendants knew or by the exercise of ordinary care could have known of the aforesaid negligent and dangerous habits of defendant McCormick; that on said day, pursuant to the aforesaid duties while plaintiff was pushing one of the aforesaid heavily loaded trucks along said tunnel and passageway said truck struck and was suddenly and abruptly stopped by the aforesaid obstructions of said tunnel and passageway and the heavily loaded truck immediately following plaintiff negligently close as aforesaid and being pushed and propelled by defendant McCormick at negligent and rapid speed as aforesaid, thereupon immediately struck and collided with plaintiff; that defendants negligently failed to stop or divert the truck so as to avoid said collision and injuries and defendant McCormick was not a reasonably safe coemploye to work with or about plaintiff; that the aforesaid methods and practices of defendants were negligently dangerous and not reasonably safe; that defendants negligently caused and permitted said truck that struck plaintiff as aforesaid to run and be propelled at a negligent, unnecessarily fast and dangerous rate of speed as aforesaid and at an unnecessarily close and dangerous distance behind plaintiff and was not reasonably safe, likely to cause injury as aforesaid, and defendant company negligently caused and permitted defendant McCormick to continue to perform his aforesaid duties in the aforesaid negligent, unsafe and dangerous manner,

habitually and customarily as aforesaid, likely to injure plaintiff as aforesaid, all of which defendant company, as well as defendant McCormick, knew, or by the exercise of ordinary care could have known, in time, by the exercise of reasonable care, to have avoided plaintiff's injuries as aforesaid; that the negligence of both defendants as aforesaid concurred and jointly co-operated to cause, and did directly and proximately cause, the aforesaid collision and the following injuries sustained by plaintiff as aforesaid, to wit:

* * * * * * *

(*Here follow allegations of injuries and damages.*)

* * * * * * *

"Wherefore, plaintiff prays judgment against defendants in the sum of fifteen thousand dollars ($15,000.00) and for his costs in this behalf expended.

Mark D. Eagleton, Attorney for Plaintiff."

Both defendants were duly served with summons the same day suit was filed (R. 5). Thereafter defendant The May Department Stores Company filed in said state court its petition for removal (R. 6) duly verified and accompanied by a proper bond. Said petition for removal is based solely upon an alleged separable controversy. It alleges that at all material times the plaintiff and defendant McCormick were citizens and residents of Missouri, and that defendant May Department Stores Company is a citizen and resident of New York, and that as between the plaintiff and defendant May Department Stores Company there is a separable controversy for which the suit is removable from the state court to the federal court.

In substance, the contention that there is a separable controversy is therein alleged to be (R. 8) that:

> "Plaintiff's petition shows that the alleged acts of negligence charged against your petitioner do not affect the resident defendant, and vice versa, and no joint cause of action is stated against said defendants. Petition further discloses that none of the acts of negligence alleged against your petitioner were the proximate cause of the collision between the truck which plaintiff was pushing and the truck which was being pushed by the resident defendant."

Those contentions are elaborated upon and argued at some length in the petition for removal.

Said state court granted the petition for removal and ordered stay of proceedings (R. 9). Thereafter, in due time, said defendant company filed in the United States District Court for the Eastern Division of the Eastern District of Missouri a transcript of the state court record, and on April 28, 1924, each defendant filed in the District Court a separate answer containing a general denial and a general plea of contributory negligence of the plaintiff (R. 13). On May 2, 1924, the plaintiff filed in said District Court his motion to remand the cause to the state court (R. 10), which was, on May 5, 1924, duly submitted to the Court on briefs, and on May 29, 1924, was overruled and denied (R. 10). Plaintiff was allowed a term bill of exceptions thereon (R. 11), which was filed June 14, 1924. Plaintiff thereafter filed a motion to reconsider the motion to remand, which was submitted to the Court

on July 7, 1924, and overruled and denied on September 5, 1924 (R. 12). A motion to require the plaintiff to give security for costs was filed October 16, 1924 (R. 13), which was, on November 3, 1924, sustained by the Court, and an order was made ruling that plaintiff within ten days deposit $50.00 or give a cost bond for $200.00 (R. 14). On November 14, 1924, the plaintiff having failed to comply with the above order to furnish security for costs, the Court ordered that the cause be dismissed because of such failure of plaintiff, and judgment for the accrued costs was entered against the plaintiff (R. 14). On February 2, 1925, the plaintiff filed and presented in said District Court a petition for a writ of error to this court (R. 15), accompanied by an assignment of errors (R. 15), which was on said day ordered allowed (R. 14), and the writ of error was duly issued, return thereto filed, and citations to the defendants issued and served (R. 1).

In allowing said writ of error the following certificate (R. 16) was signed, sealed and filed in said cause as a part of the record thereof, to wit:

Judge's Certificate of Question of Jurisdiction.

"In this cause it is hereby certified that the jurisdiction of this Court as a federal court is in issue, and that in overruling the motion to remand and in entering judgment of dismissal it was decided and adjudged that this Court acquired jurisdiction by removal based upon a separable controversy under Section 28 of the Judicial Code, and that such separable controversy is shown by the record in this cause, and it was decided that this Court has jurisdiction by virtue thereof; it is further certified that said question of jurisdiction was decided solely upon the record and that no testimony or evidence was heard or considered.

"Wherefore, said question of jurisdiction alone is hereby certified to the Supreme Court of the United States for decision, pursuant to Section 238 of the Judicial Code.

"Signed, sealed and made a part of the record this 2nd day of February, 1925, in the September Term, 1924, of the court.

(Signed) Charles B. Davis,
District Judge Holding the District Court of the United States for the Eastern Division of Eastern Judicial District of Missouri."

(e)

THE ASSIGNMENT OF ERRORS (R. 15)

is as follows:

"Now comes plaintiff herein and in connection with his petition for writ of error filed herewith, and as and for his assignment of errors, says that in the said record and proceedings there is manifest error in this, to wit:

"1. The Court erred in dismissing the cause, instead of remanding it to the state court.

"2. The Court erred in overruling plaintiff's motion to remand the cause to the state court and in refusing to so remand it.

"3. The Court erred in holding that it had jurisdiction of the cause.

"4. The Court erred in holding that there is a separable controversy authorizing removal and giving the Court jurisdiction.

"Wherefore, plaintiff prays that said judgment be reversed.

(Signed) Mark D. Eagleton,
Attorney for Plaintiff."

(f)

SUMMARY OF ARGUMENT.

I.

Existence of a separable controversy, authorizing removal, is to be determined solely from the allegations of the plaintiff's petition, by application thereto of the state law, both substantive and procedural. If the plaintiff's petition, as so construed, states a joint cause of action against both defendants, then there is no separable controversy authorizing removal.

Chicago, R. I. & Pac. Ry. Co. v. Dowell, 229 U. S. 102;
Southern Ry. Co. v. Miller, 217 U. S. 209;
McAllister v. Ches. & Ohio Ry. Co., 243 U. S. 302;
Chicago & Alton Ry. Co. v. McWhirt, 243 U. S. 422;
Chicago, R. I. & Pac. Ry. Co. v. Schwyhart, 227 U. S. 184;
Chicago, B. & Q. Ry. Co. v. Willard, 220 U. S. 413;
Cincinnati, N. O. & Tex. Pac. Ry. Co. v. Bohon, 200 U. S. 221;
Alabama, G. S. Ry. Co. v. Thompson, 200 U. S. 206;
Southern Ry. Co. v. Carson, 194 U. S. 136;
Ches. & Ohio Ry. Co. v. Dixon, 179 U. S. 131;
Charman v. Railroad et al., 105 Fed. 449;
Richardson v. Power Co. et al., 209 Fed. 949;
Brunski v. Ford Motor Co. et al., 299 Fed. 807 (Mo.).

II.

Plaintiff's petition states a joint cause of action against both defendants by alleging in substance:

(a) That defendant McCormick was habitually negligent in running his truck too fast and too close behind the man ahead and without exercising due care to observe persons ahead to avoid collision, and

(b) That defendant McCormick ran his truck against plaintiff, injuring him, and that the collision was caused by negligence of McCormick in the respects above alleged as habitual, and

(c) That defendant May Department Stores Company (for whom both plaintiff and defendant McCormick were working), with actual or constructive knowledge of McCormick's habitual negligence, as aforesaid, negligently permitted McCormick to continue to perform his duties in the aforesaid negligent manner, and

(d) That defendant May Department Stores Company was negligent in other respects pleaded, and

(e) That the collision and plaintiff's injuries were caused by the concurrence of the above negligence of both defendants.

Burns v. R. L. McDonald Mfg. Co., 213 Mo. App. 640;

Sustar v. Bambrick Bros. Const. Co., 179 Mo. App. 495;

Kersey v. Kansas City, St. J. & C. B. R. Co., 79 Mo. 362;

Pittsburg Rys. Co. v. Thomas, 174 Fed. 591, 98 C. C. A. 437.

III.

Negligent tort-feasors are jointly liable for their concurring negligence.

Chicago, R. I. & Pac. Ry. Co. v. Dowell, 229 U. S. 102;
Morin v. Rainey et al., 207 S. W. 858 (Mo. St. Louis Ct. App. 1919);
Miller v. United Rys. Co. et al., 155 Mo. App. 528;
Carr v. St. Louis Auto Supply Co., 293 Mo. 562;
Smith v. Fordyce, 190 Mo. 1;
Brunski v. Ford Motor Co. et al., 299 Fed. 807 (Mo.).

IV.

Plaintiff's petition does not show that the negligence alleged against defendant McCormick was the **sole** proximate cause of the injuries. The negligence of defendant May Department Stores Company is shown to have been a concurring proximate cause, and both defendants are liable jointly.

Chicago, R. I. & Pac. Ry. Co. v. Dowell, 229 U. S. 102;
Young v. The Shickle, H. & H. Co., 103 Mo. 324;
Standard Oil Co. v. Brown, 218 U. S. 78;
Kreigh v. Westinghouse, Church, Kerr & Co., 214 U. S. 249;
Moriarity v. Schwarzschild & Sulzberger Co., 132 Mo. App. 650;
Union Pac. Ry. Co. v. Callaghan, 56 Fed. 988, 6 C. C. A. 205;

New Jersey & N. Y. R. Co. v. Young, 49 Fed. 723, 1 C. C. A. 428;
Root v. K. C. Southern Ry. Co., 195 Mo. 348;
Vaughn v. Meier, 246 S. W. 279 (Mo. Supreme Ct. 1922);
Ellis v. N. Y. Lake Erie & W. R. Co., 95 N. Y. 546;
Wallin v. Eastern Ry. Co. of Minn., 83 Minn. 149;
Houston & T. C. Ry. Co. v. Kelly, 35 S. W. 878 (Tex. Civ. App. 1896);
Schuh v. American Car & Fdy. Co., 21 S. W. 624 (Mo. St. Louis Ct. App. 1922);
Smith v. Greer, 216 Mo. App. 155;
Brown v. Kansas Nat. Gas Co., 299 Fed. 463 (8th C. C. A.);
Shafir v. Sieben, 233 S. W. 419 (Mo. Supreme Ct. in Banc, July, 1921).

V.

Joint or concurring negligence of the defendants is alleged as the proximate cause of plaintiff's injuries. Whether, under all the circumstances, the negligence alleged is the proximate cause may be for the jury to determine as a question of fact.

Milwaukee & St. P. Ry. Co. v. Kellogg, 94 U. S. 469.

VI.

For plaintiff's injuries he has only one cause of action to recover damages, and he is entitled to only one satisfaction thereof. His right in Missouri to jointly sue

and recover damages from all persons liable therefor is conferred by express statute, to wit:

> Vol. I. Revised Statutes Missouri 1919, Sec. 1160, page 483. "**Who may be joined as defendants.**— Every person who shall have a cause of action against several persons, including parties to bills of exchange and promissory notes, and who shall be entitled by law to one satisfaction therefor, may bring suit thereon jointly against all or as many of the persons liable as he may think proper; and he may, at his option, join any executor or administrator or other person liable in a representative character with others originally liable."

VII.

Plaintiff's petition properly pleads the negligence relied on.

> Rueter v. Terminal R. R. Assn., 261 S. W. 713 (Mo. St. Louis Ct. App. 1924).

ARGUMENT.

I.

Separable Controversy.

It is settled that the existence of a separable controversy, authorizing removal, is to be determined solely from the allegations of the plaintiff's petition, by application thereto of the state law, both substantive and procedural, and that if the plaintiff's petition, as so construed, states a joint cause of action against both defendants, then there is no separable controversy authorizing removal.

Chicago, R. I. & Pac. Ry. Co. v. Dowell, 229 U. S. 102;
Southern Ry. Co. v. Miller, 217 U. S. 209;
McAllister v. Ches. & Ohio Ry. Co., 243 U. S. 302;
Chicago & Alton Ry. Co. v. McWhirt, 243 U. S. 422;
Chicago, R. I. & Pac. Ry. Co. v. Schwyhart, 227 U. S. 184;
Chicago, B. & Q. Ry. Co. v. Willard, 220 U. S. 413;
Cincinnati, N. O. & Tex. Pac. Ry. Co. v. Bohon, 209 U. S. 221;
Alabama, G. S. Ry. Co. v. Thompson, 200 U. S. 205;
Southern Ry. Co. v. Carson, 194 U. S. 136;
Ches. & Ohio Ry Co. v. Dixon, 179 U. S. 131;
Charman v. Railroad et al., 105 Fed. 449;
Richardson v. Power Co. et al., 209 Fed. 949;
Brunski v. Ford Motor Co. et al., 299 Fed. 807 (Mo.).

All the above decisions are in negligence cases, but the same rule, that if a joint cause of action is stated there is no separable controversy, is uniformly applied to all classes of tort cases, and nearly a hundred decisions by this Court so holding could be cited.

In **Chicago, R. I. & P. Ry. Co. v. Dowell (supra), 229 U. S. 102,** the plaintiff sued his employer and also a fellow servant, charging different particulars of negligence against each. The case involved facts and principles similar to those in the case at bar. The Court said (l. c. 111, 112):

> "The claim of a right to have the cause removed to the Circuit Court of the United States was that the requisite diversity of citizenship existed as between the plaintiff and the petitioning railroad company, and that there existed as between them a separable controversy.
>
> "But if the plaintiff alleges that the concurrent negligence of the railroad company and its employe, Johnson, was the cause of his injury, he has a right to join them in one action. If he elects to do so, it supplies no ground for removal, because he might have sued them separately (Louisville & N. R. Co. v. Wangelin, 132 U. S. 599, 601; Powers v. Chesapeake & O. R. Co., 169 U. S. 92; Alabama G. S. R. Co. v. Thompson, 200 U S. 206).
>
> **"The petition of the plaintiff below was in substance that the defective character of the engine, the unfitness and incompetency of Johnson, the engineer controlling it, and his negligence and carelessness in needlessly running the engine over him without the exercise of proper care and caution, 'concurrently and**

jointly contributed to the injuries of said plaintiff,' who was at the time in the exercise of due care.

"But it is said that some of the matters charged against Johnson consisted in acts of nonfeasance, and that an employer is not liable to a third person for conduct of that character.

"Whether liability to a third person against a master may result from the servant's neglect of some duty owing to the employer alone may be debatable. But we need not consider that question, since the plaintiff's declaration averred positive acts of negligence on the part of Johnson toward the plaintiff, namely, that while engaged in the company's service in the movement of the engine he did not exercise that degree of care and skill which he was bound to exercise toward another servant engaged upon the tracks in the company's work."

In **Charman v. Railroad et al.**, 105 Fed. 449, the suit was for wrongful death of an employe of the railroad charged to have resulted from the negligence of the railroad and its foreman, both of whom were joined as defendants. The railroad removed, and on motion to remand the Court, in holding that there was no separable controversy, after citing Supreme Court decisions, said (l. c. 453, 454):

"It is not essential that the duty violated by each should be joint or identical, nor that the duty of each should be deduced from the same legal principles. The case of a joint action by a passenger who is injured by the collision of two trains owned and operated by different railroad corporations affords a fa-

miliar illustration. The duty of the carrier of the passenger is to exercise the highest practicable degree of care to protect him from hurt. Its liability grows out of the breach of this duty. The duty of the other company is to use ordinary and reasonable care not to collide with the train carrying the passenger. Its liability grows out of the breach of this duty. The two companies may be jointly sued for the injury of the passenger, and the cause of action is not separable and removable by one of the two defendants (Railway Co. v. Martin, 59 Kan. 437, 53 Pac. 461; Id., 178 U. S. 245, 20 Sup. Ct. 854, 44 L. Ed. 1055). Hence it is apparent that it is not necessary to the maintenance of a joint action for tort that the injury should grow out of the breach of a joint duty, nor out of the same or similar duties deducible from the same or similar principles of law."

In **Richardson v. Power Co. et al.**, 209 Fed. 949, the action was for wrongful death of an employe brought against his employer and several other corporations under circumstances where their duties were different. Removal was on the ground of separate controversy, but the cause was remanded, the Court saying (l. c. 954):

"Accepting as true the facts as they are alleged, the negligence of each and all the defendants was concurrent, and co-operated in causing the accident, and in case of co-operating or concurrent negligence the injured party may, at his option, sue the wrongdoers either jointly or severally" * * * (cites cases and texts). * * * "To adopt the view contended for by the removing defendant would be equivalent to holding that there has been a misjoinder of parties

defendant, and that, in order to recover from them, it would be necessary for the plaintiff to bring a separate suit against each one."

The question for decision, therefore, is whether

II.

Plaintiff's Petition States a Joint Cause of Action Against Both Defendants.

Plaintiff's petition, after alleging that defendant May Department Stores Company, in its place of business in St. Louis, Missouri, had a tunnel or passageway through which its loaded hand trucks were propelled by employes, each employe pushing a separate truck, and that plaintiff and defendant McCormick were employes engaged in such work, alleges in substance that defendant McCormick was habitually negligent in speeding the truck he was pushing, and running it too close behind the man ahead, and not keeping proper lookout ahead to avert collision, and that he was not a reasonably safe employe, and that defendant May Department Stores Company, with actual or constructive knowledge, negligently permitted defendant McCormick to continue in the performance of his duties in said reckless manner, and that defendant McCormick, through his negligence in the above respects, caused his truck to collide with plaintiff, injuring him, and that plaintiff's injuries were directly and proximately caused by the defendants' joint and concurring negligence

as aforesaid. To establish the above it will be necessary for the plaintiff at the trial to prove:

1. That defendant McCormick was habitually negligent in the respects alleged, and

2. That on the particular occasion defendant McCormick was negligent in the same respects, thereby causing the collision and plaintiff's injuries, and

3. That defendant May Department Stores Company was negligent because it, with knowledge actual or constructive, of the aforesaid habitual negligence of McCormick, nevertheless negligently permitted McCormick to continue to perform his duties, thereby exposing plaintiff to the hazard of injury as aforesaid, and causing the collision and injury.

The following cases establish the master's liability based upon the habitual negligence of a fellow servant, and also support the above contention as to joint liability.

Burns v. R. L. McDonald Mfg. Co., 213 Mo. App. 640;
Sustar v. Bambrick Bros. Const. Co., 179 Mo. App. 495;
Kersey v. Kansas City, St. J. & C. B. R. Co., 79 Mo. 362;
Pittsburg Rys. Co. v. Thomas, 174 Fed. 591, 98 C. C. A. 437.

Burns v. R. L. McDonald Mfg. Co., 213 Mo. App. 640, 252 S. W. 984 (1923), was a suit against the common master based upon the habitual negligence of a fellow

servant named Zeigler. In affirming a judgment for plaintiff the Court said (l. c. 645, 646):

> "It is no doubt true that in order to render a master liable on the ground defendant is herein sought to be held, the negligence of the servant 'must be habitual, rather than occasional, or of such a character as to render it imprudent to retain him in service.' * * * Furthermore, the master cannot be held liable for retaining an habitually careless servant, unless the injury is shown to be connected with or caused by the faulty trait in the servant. * * * And knowledge, either actual or constructive, of such faulty trait or habit must be shown against the master; mere proof that the servant was incompetent and that the plaintiff was injured does not raise an inference of negligence against the master in that regard. * * *"

L. c. 651:

> "Zeigler was present in the court room at the time of the trial. His interests were all opposed to plaintiff and in favor of defendant. He was the servant charged with being blameworthy and negligent. He could have been sued and held liable for the injury."

In **Sustar v. Bambrick Bros. Const. Co.**, 179 Mo. App. 495, 162 S. W. 730 (1914), the plaintiff was in the employ of defendant company engaged in his duties in a trench which was being dug by defendant. Appurtenant thereto defendant company operated a sewer machine, whereby large buckets were filled in the trench and then elevated therefrom and moved along over the top of the trench and over plaintiff and then dumped. Another employe there

gave the signals to elevate the bucket and gave the signals indicating when the bucket should be started on its horizontal movement. One of the buckets, while being carried over plaintiff, struck certain crossbeams across the trench over plaintiff's head, thereby causing a large rock to fall from the bucket and strike and injure plaintiff. In his petition the plaintiff alleged that the signalman, Fisher, was habitually negligent in giving the signal before the bucket had been elevated high enough to safely clear the crossbeams, and that his negligence in that respect caused the plaintiff's injuries, and that the defendant company was negligent in permitting Fisher, after actual or constructive knowledge of his habitual negligence, to continue to perform his duties. Plaintiff also alleged that the method of work was negligent because the buckets, while being carried over his head, were likely to cause him to be injured, and that the general construction and arrangement of the machine and the trench were negligent and likely to cause him to be injured as aforesaid. In affirming a judgment for plaintiff and holding that the evidence made a prima facie case for the jury as to Fisher's habitual negligence and the defendant's liability based thereon, the Court said (l. c. 506):

> "It is true that in order to cast liability upon the master for the act of a fellow servant of the plaintiff, upon the ground of the incompetency or habitual negligence of such fellow servant, the general rule is that it must appear that the latter was habitually incompetent or negligent, and that such habitual in-

competency or negligence of the servant was known to the defendant, or by the exercise of ordinary care could have been known to him, and that the master, after having such actual or constructive knowledge thereof, retained the incompetent or negligent servant in his employ."

In **Kersey v. Kansas City, St. Joseph & Council Bluffs Railroad Company**, 79 Mo. 362 (1883), the Court said (l. c. 365):

"The petition seems to have been framed upon the theory that if a servant is injured through the instrumentality of an unfit and incompetent fellow servant, and the master has been guilty of negligence in employing such incompetent servant, he will be liable to the injured servant, although the incompetent servant was, at the time of the injury, guilty of no negligence or unskillfulness. Such is not the law. The rule is that where one servant is injured by the negligence or unskillfulness of a fellow servant in the performance of his duties, and such servant was incompetent or unfit for the duties assigned to him, the master will be liable if he was guilty of negligence in employing or retaining in his service such incompetent servant, but certainly the master cannot be held liable unless the incompetent servant was guilty of some negligence or misconduct directly contributing to produce the injury. It is not enough that one servant is injured while an incompetent servant, known by the master to be such, is engaged in the same common employment."

From the foregoing we think it is clear that the allegations of plaintiff's petition state a joint cause of action

based on negligence of defendant McCormick for which he is personally liable, and based upon negligence of the May Department Stores Company in permitting McCormick, after he was known to be habitually negligent, as aforesaid, to continue at the work. Not only is their liability in the above respects joint, but plaintiff cannot possibly prove his case against the company without proof of a case of negligence against defendant McCormick.

Plaintiff's petition further charges that defendant May Department Stores Company was negligent in other respects that were also concurrent causes of the collision and plaintiff's injuries, and in the petition for removal these other charges of negligence are treated as the **only** charges against the May Department Stores Company, thereby wholly ignoring the above-discussed negligence of the company based upon McCormick's habitual negligence. But even if the habitual negligence of McCormick creating the company's liability were omitted there still would remain allegations of a joint cause of action based upon the other negligence of defendant May Department Stores Comapny concurring with the negligence of McCormick in running his truck as aforesaid, for the reasons hereinafter discussed under points III and IV.

III.

Joint Liability for Concurring Negligence.

The rule that negligent tort-feasors are jointly liable for

car operated by one defendant, and it was run into by a runaway team and wagon of the other defendant, causing plaintiff's injuries. In discussing the question of proximate cause involved, the Court said (l. c. 541):

> "* * * It is certain an injured party, such as this plaintiff, is entitled in every instance to recover from either one or both of the tort-feasors whose negligence concurs in and directly contributes to his injuries. * * * Judge Thompson says: 'If the concurrent or successive negligence of two persons, combined together, result in an injury to a third person, he may recover damages of either or both, and neither can interpose the defense that the prior or concurrent negligence of the other contributed to the injury. Thus, A leaves his horse and cart standing in the street, without any person to watch them, and a passer-by strikes the horse, in consequence of which damage ensues. A is answerable for such damages' (Section 75, Thompson's Com. on Neg., Vol. 1)."

In **Carr v. St. Louis Auto Supply Co.**, 293 Mo. 562 (1922), the Court, in referring to an instruction on liability for concurrent negligence, said (l. c. 569):

> "This distinctly embodied the doctrine of concurring negligence, which is recognized in this state as well as in nearly every other jurisdiction in which the doctrine of the English common law with reference to liability for negligence prevails. It is stated in Shearman & Redfield on Negligence (6th Ed.), Section 122, as follows:
>
> " 'Concurrent, as distinguished from joint, negligence arises where the injury is proximately caused

by the concurrent wrongful acts or omissions of two or more persons acting independently. That the negligence of another person than the defendant contributes, concurs, or co-operates to produce the injury is of no consequence. Both are ordinarily liable. And unless the damage caused by each is clearly separable, permitting the distinct assignment of responsibility to each, each is liable for the entire damage. The degree of culpability is immaterial.'

"It has been approved and enforced in this state in many cases * * *"

In **Smith v. Fordyce**, 190 Mo. 1 (1905), the Court said (l. c. 21):

"It is a settled principle of law in this state that if damage or injury 'is caused by the concurring force of a defendant's negligence and some other force for which he is not responsible, including "the act of God," or superhuman force intervening, the defendant is nevertheless responsible, if his negligence is one of the proximate causes of the damage. It is also agreed that if the negligence of the defendant concurs with the other cause of the injury in point of time and place, or otherwise so directly contributes to the plaintiff's damage, that it is reasonably certain that the other cause alone would not have sufficed to produce it, the defendant is liable, notwithstanding he may not have anticipated the interference of the other or superior force, which concurring with his own negligence produce the damage' (Brasch v. St. Louis, 161 Mo., l. c. 438, and cases cited)."

IV.

Proximate Cause and Joint Liability.

In the petition for removal defendant May Department Stores Company contends that the allegations of negligence against defendant McCormick constitute the sole proximate cause of the injuries, and that the negligence charged against defendant company is remote, and hence that no cause of action is stated against the defendant company. Of course, as to the negligence of the company based upon McCormick's habitual negligence this contention is manifestly without merit for reasons heretofore discussed under point II. However, independent of that, the petition alleges a joint cause of action based upon McCormick's negligence in the operation of the truck, and the negligence of the company in other respects than permitting habitually negligent McCormick to continue work. Those other charges of negligence against the company are in substance that plaintiff's place of work was not reasonably safe because the tunnel or passageway was littered with debris and obstructions likely to cause his truck to be suddenly stopped and the truck following to strike and injured him in the manner that he was in fact injured. It is also alleged that large and heavy loads on the trucks made plaintiff less able to observe and avoid the obstructions, and made other employes following him less able to avoid collision, and that the company negligently permitted the trucks to be operated in a dangerous manner and too

close to the man ahead, all of said negligence concurring with McCormick's negligence to cause the collision and plaintiff's injuries. The specific contention made as to that in the petition for removal (R. 8) is that

> "No matter what the surroundings were and no matter what alleged previous negligence your petitioner may have been guilty of, if the resident defendant saw, or by the exercise of ordinary care would have seen, the plaintiff and saw, or by the exercise of ordinary care would have seen, the truck which plaintiff was pushing, stop in time to have avoided the collision, his failure to do so would obviously be the sole proximate cause of the collision and of plaintiff's alleged injuries."

Manifestly plaintiff's petition does not allege the facts supposed in the above misconstruction of it. But even if it did the contention that McCormick's negligence would then be shown as a matter of law to be the sole proximate cause is unfounded. The company's negligence is also a proximate, concurring, efficient cause for which it is liable, notwithstanding the fellow servant's negligence contributing to cause the collision, or that the fellow servant, by the exercise of more care, might have prevented the injuries. The following cases refute the specific contention made above and show that under plaintiff's petition both defendants are jointly liable for the collision and plaintiff's injuries caused by concurring negligence in all the respects alleged.

Chicago, R. I. & Pac. Ry. Co. v. Dowell, 229 U. S. 102;

Young v. The Shickle, H. & H. Iron Co., 103 Mo. 324;

Standard Oil Co. v. Brown, 218 U. S. 78;

Kreigh v. Westinghouse, Church, Kerr & Co., 214 U. S. 249;

Moriarity v. Schwarzschild & Sulzberger Co., 132 Mo. App. 650;

Union Pac. Ry. Co. v. Callaghan, 56 Fed. 988, 6 C. C. A. 205;

New Jersey & N. Y. R. Co. v. Young, 49 Fed. 723, 1 C. C. A. 428;

Root v. K. C. Southern Ry. Co., 195 Mo. 348;

Vaughn v. Meier, 246 S. W. 279 (Mo. Supreme 1922);

Ellis v. N. Y. Lake Erie & W. R. Co., 95 N. Y. 546;

Wallin v. Eastern Ry. Co. of Minn., 83 Minn. 149;

Houston & T. C. Ry. Co. v. Kelly, 35 S. W. 878 (Tex. Civ. App. 1896);

Schuh v. American C. & Fdy. Co., 241 S. W. 641 (Mo. St. Louis Ct. App. 1922);

Smith v. Greer, 216 Mo. App. 155;

Brown v. Kansas Nat. Gas Co., 299 Fed. 463 (8th C. C. A.);

Shafir v. Sieben, 233 S. W. 419 (Mo. Supreme Ct. in banc, July, 1921).

Young v. The Shickle, H. & H. Iron Co., 103 Mo. 324, 15 S. W. 771 (1890), is in several respects very similar to the case at bar. The following quotation sufficiently indicates the facts, the issues involved and the decision thereon (l. c. 327, 328):

"The petition is unusually full in the description of the surrounding circumstances at the place and

time of the accident, and there is nothing in them to indicate negligence, so that it must stand or fall on the express averments of negligence. Keeping the situation of affairs as they existed in mind, what are the substantial averments? They are that the other employe, in performing the work assigned to him, passed along the narrow passageway on the platform hurriedly and ran against and forcibly struck the plaintiff and knocked him off the platform; that defendant was negligent in the construction of the platform in not providing it with sufficient guard rails; that defendant negligently allowed a large quantity of material to be piled thereon so that the platform was not suitable to carry on the work in which plaintiff was engaged.

"Thus far the petition states no cause of action whatever, for it is not alleged that the negligence of defendant caused, produced or brought about the injury. But as a part of the prayer for relief there is an averment that plaintiff was damaged by reason of defendant's negligence. * * * Taking this petition as a whole, we think it alleges that the injuries were caused by the alleged negligence of the defendant.

"The objection is made that the want of sufficient guard rails to the platform and the materials placed upon it are matters which were open to the observation of the plaintiff; that he had full knowledge of them and that he assumed all risks. It may be that he had knowledge of these alleged defects, but it is not so stated in the petition. * * * It is the well-settled law of this court that the plaintiff need not allege that he was without fault; that contributory negligence is a matter of defense (Crane v. Railroad, 87 Mo. 588). It was also held in that case that the

plaintiff need not aver that he had no knowledge of the defective character of the machinery, and that an allegation that the defendant negligently furnished an appliance which was defective and unsafe was equivalent to a statement that the master knew, or might have known by use of ordinary care, of the dangerous and defective character of the appliance. To the same effect is the case of Johnson v. Railroad, 96 Mo. 340. Knowledge of the alleged defects is a matter of defense, and since knowledge on the part of the plaintiff does not appear on the face of the petition the objection is not well taken.

"It certainly does appear that a fellow servant ran against the plaintiff and knocked him off the platform, but a servant may recover for an injury caused by the combined negligence of the master and a fellow servant (Thomp. on Neg., p. 981). The same doctrine is intimated in Steffen v. Mayer, 96 Mo. 420. A valuable list of cases on this subject will be found in notes to Coppins v. Railroad, 44 Am. & Eng. R. R. Cas. 134. It may be that in point of fact the plaintiff was injured solely by reason of the negligence of his fellow servant, in which case he cannot recover, but it is not so stated in the petition. The averment is that the plaintiff was damaged by reason of the negligent omissions of the defendant. In our opinion the petition states a cause of action."

In **Standard Oil Co. v. Brown, 218 U. S. 78** (1910), the plaintiff, while in the employ of defendant company, engaged in its duties in one of defendant's barns, wherein there was a large opening in the ceiling, was struck and injured by a bale of straw thrown down through the opening from the loft above by a fellow servant, Coleman, with-

out warning. Plaintiff's action was predicated upon negligence of defendant company in failing to warn or advise plaintiff of the existence of the opening in the ceiling, or of the custom to throw down bales therefrom. In affirming a judgment for the plaintiff this Court said (l. c. 85, 86):

> "Let it be granted that Coleman was a fellow servant of defendant in error, and was negligent; it was nevertheless for the jury to say whether the fault of the company contributed to the injury (Kreigh v. Westinghouse C. K. & Co., 214 U. S. 249). * * *
>
> "The negligence of a fellow servant was sought to excuse the master for his neglect in Grace & H. Co. v. Kennedy, 40 C. C. A. 69, 99 Fed. 679. In reply to it the Court said, by Circuit Judge Shipman:
>
> " 'The defect in the argument is a continuance of the omission to recognize the ordinary necessity for the protection of the employes, and that **the absolute duty of the master to provide a safe place is not avoided by the neglect of his representative or servants to do the things which will obviously prevent the known original danger.**' "

In **Kreigh v. Westinghouse, Church, Kerr & Co., 214 U. S. 249** (1909), the defendant company was operating a derrick with a swinging boom, raising and lowering materials in a bucket. After unloading the bucket employes of the defendant swung the bucket and boom out over the side of the building to be lowered, and it went too far and struck the plaintiff, who was a fellow servant of the other workmen. Plaintiff claimed that the method of swinging and checking the boom and bucket was negligent, and that

the defendant company was negligent in other respects. The defendant contended that the derrick and method of operating it was reasonably safe and that plaintiff's injuries were caused solely by the negligence of his fellow workman in pushing the boom and bucket with too much force. In the trial court, at the conclusion of the plaintiff's evidence, the case was taken from the jury and a demurrer to the evidence sustained. The Circuit Court of Appeals affirmed the judgment, and on certiorari this Court, in reversing and remanding the cause said (l. c. 257):

> "It is contended by the defendant that the boom could have been safely operated with one rope had the men used care in the operation thereof. But in view of the testimony referred to we think it was a question for the jury to determine whether the character of derrick furnished by the master discharged his obligation to furnish and maintain for the plaintiff and his associates a reasonably safe place in which to labor, and whether that kind of derrick was not of itself a dangerous instrumentality when operated where others were likely to labor in the course of their employment.
>
> "If the negligence of the master in failing to provide and maintain a safe place to work contributed to the injury received by the plaintiff the master would be liable, notwithstanding the concurring negligence of those performing the work (Grand Trunk R. R. Co. v. Cummings, 106 U. S. 700; Deserant v. Cerrillos Coal R. Co., 178 U. S. 409, 420, and cases there cited)."

In **Moriarity v. Schwarzschild & Sulzberger Co.**, 132 Mo. App. 650, 112 S. W. 1034 (1908), the defendant company maintained an elevator in its place of business and the plaintiff was in its employ engaged in unloading barrels from the elevator. On a floor above plaintiff the door to the elevator shaft was open, and the flooring in front of the elevator door for some distance had a very gradual incline. A fellow servant of plaintiff was on that floor above rolling barrels and leaving them at a point near the incline on the floor, to be later put upon the elevator. The fellow servant knew of the slant or incline of the floor and was purposely putting the barrels on the level part of the floor near the inclined part. The evidence tended to show that the fellow servant had placed one of the barrels on the incline instead of on the level part, and that the barrel, after being in that position stationary for a short time, had rolled down the incline into the shaft through the open door and fell and struck plaintiff. The Court held that the plaintiff's injuries resulted from the concurring effects of the defect in the floor and the failure of the defendant company to guard the opening into the elevator, and the act of the fellow servant in placing the barrel on the incline of the floor, and in affirming a judgment for plaintiff said (l. c. 655):

> "If this door had been closed the injury would not have happened, notwithstanding the defect in the floor. And it might also be said that, if there had been no incline in the floor, the plaintiff would not have been injured notwithstanding the elevator door

was left open. And also that it might not have been caused by reason of either, or both, had not Flisk (the fellow servant) by mistake placed the barrel on the incline, which he must have done. And whether the mistake or carelessness of Flisk contributed to the result is immaterial, as his negligence, combined with that of defendant, renders the defendant liable for the result.

"If the master is negligent, his negligence is not excused by the fact that the negligence of the fellow servant of plaintiff contributed with that of the master to cause the injury."

In **Union Pacific Ry. Co. v. Callaghan**, 56 Fed. 988, 6 C. C. A. 205 (8th Circuit, 1893), affirmed, 161 U. S. 91 (1895), the Circuit Court of Appeals, in affirming a judgment for the plaintiff, said concerning "proximate cause" (l. c. 991-994):

"In considering these questions it must also be borne in mind that the proximate cause is not always nor generally the act or omission nearest in time or place to the effect it produces. In the sequence of events there are often many remote or incidental causes nearer in point of time and place to the effect than the moving cause, and yet subordinate to and often themselves influenced if not produced by it. Thus, a defect in the construction of a boiler of an engine may long exist without harm, and yet finally be the proximate cause of an explosion to which the negligence of an engineer, the climate, and many other incidental causes, nearer by years to the effect, may contribute. Cases illustrating this proposition are: Railroad Co. v. Kellogg, supra (94 U. S. 469);

Insurance Co. v. Boon, 95 U. S. 117, 130; Lynch v. Nurdin 1 Q. B. 29; Illidge v. Goodwin, 5 Car. & P. 190, 192; Clark v. Chambers, 3 Q. B. Div. 327; Pastene v. Adams, 49 Cal. 87.

"Again, an effect is usually the result of many causes, some proximate, others remote. The rule by which the former are to be separated from the latter is admitted by all to be difficult of application, and the best that can be done is to carefully apply it to the circumstances of each case as it arises. * * *

"(l. c. 993) The negligence of the engineer was not the intervening cause that interrupted or turned aside the natural sequence of events, or prevented the natural and probable effect of the conductor's negligence. It simply failed to interpose the engineer's care to prevent this probable result, and left the natural sequence of events to follow on undisturbed to the fatal effect. It may be true that, if the engineer had seen and obeyed the danger signal on the track, or had seen the damage to the bridge, and had stopped the train, the accident would not have happened; but his failure was but the concurring or succeeding negligence of a servant which permitted the conductor's breach of duty to work out undisturbed to the disastrous result of which it was the primary and efficient cause. * * *

"The independent intervening cause that will prevent a recovery on account of the act or omission of a wrongdoer must be a cause which interrupts the natural sequence of events, turns aside their course, prevents the natural and probable result of the original act or omission, and produces a different result, that could not have been reasonably anticipated. The concurrent or succeeding negligence of a fellow-servant or a third person which does not break the

> sequence of events is not such a cause, and constitutes no defense for the original wrong-doer, although, in the absence of the concurrent or succeeding negligence, the accident would not have happened. * * *"

In **New Jersey and New York R. R. Co. v. Young**, 49 Fed. 723, 1 C. C. A. 428 (Second Circuit, 1892), the plaintiff, an employe of the defendant company, while firing the locomotive of its express train, was injured by a collision of his train with some cars on a sidetrack ahead of it, caused by an open switch which was indicated by a red light. The engineer was a fellow-servant of the plaintiff and approached the switch at the rate of twenty-five miles per hour and, upon seeing that the switch was open, applied the airbrake and reversed his engine, but the airbrake was out of repair and the collision was not prevented. In affirming a judgment for the plaintiff, based upon negligence of the defendant company in permitting the brake to be defective, the Court said (l. c. 725):

> "If it should be assumed that the engineer was guilty of negligence, either by his disregard of the regulations or otherwise, which contributed to the accident, such negligence would not necessarily defeat the action, if the negligence of the defendant was also contributory (Railway Co. v. Cummings, 106 U. S. 700, 1 Sup. Ct. Rep. 493). The defendant would not be liable if the negligence of the engineer was the sole cause of the accident, because, being a fellow-servant with the plaintiff, his negligence was one of the risks for which the defendant, as master, did not

assume to be responsible. But negligence of a fellow-servant does not excuse the master from liability to a coservant for an injury which would not have happened had the master performed his duty (Coopins v. R. R. Co., 122 N. Y. 557, 25 N. E. 915. It was a fair question of fact in the present case whether the accident would have happened if the airbrake had been in proper order, because, notwithstanding the train was proceeding at an improper rate of speed and in violation of the instructions, there was evidence to indicate that the train could have been stopped before reaching the switch after the brake was applied."

In **Root v. Kansas City Southern Ry. Co.**, 195 Mo. 348, 92 S. W. 621 (1905), the plaintiff was a brakeman in the employ of the defendant company and while engaged in his duties riding upon one of its trains he reasonably jumped therefrom before the train ran upon a burning trestle or bridge and was injured. The engineer of the train was a fellow servant of plaintiff, for whose acts the defendant company was not liable. The theory of the plaintiff's action was that the defendant company was negligent in certain respects causing the bridge to burn. The evidence showed that the engineer negligently approached the bridge at an excessive rate of speed under the circumstances, and that he negligently failed to stop the train before it ran upon the bridge. The Court held that the issues of proximate cause were properly submitted to the jury, and that if the jury found that the engineer's negligence was the sole cause of the injury, then the plaintiff could not recover, but that if his negligence united

with the negligence of the company to produce the injury, then the plaintiff was entitled to recover.

In **Vaughn v. Meier**, 246 S. W. 279 (Mo. Supreme, 1922, not officially reported), the defendant had left his automobile parked on a street that had a downgrade, where it was afterward started in motion by vibration of passing vehicles, or some other cause, and as it was running down the street without a driver a third person (Karf), seeing the danger, jumped upon the running board of it and attempted to stop or divert it to avoid injuries to persons on the street, but was unsuccessful, and it ran upon a sidewalk and injured the plaintiff. In discussing the question of proximate cause the Court said (l. c. 281):

> "There may be more than one proximate cause of an accident, several concurring proximate causes, in which event both parties guilty of negligence would be liable to the injured party. If Karf was negligent, which we do not decide, his negligence was but a concurring proximate cause, and not the sole proximate cause, of plaintiff's injury."

In **Ellis v. New York, Lake Erie & Western R. R. Co.**, 95 N. Y. 546 (1884), a brakeman in the employ of defendant company was engaged in his duties in a caboose at the rear of one of its trains. While the train was in motion it was run into from the rear by another train of defendant, and, due to a defect in the bumpers between the caboose and the car ahead of it, the car ahead was thereby pushed up onto the platform of the caboose, causing the brakeman's death, for which suit was brought.

The men operating the rear train were fellow servants, for whose negligence the defendant would not be liable. The Court affirmed a judgment for the plaintiff and held that even though the employes operating the second train were negligent, causing the collision, that the above-mentioned defect in the cars was also a contributing or concurring proximate cause, for which the defendant company was liable.

In **Wallin v. Eastern Ry. Co. of Minn.**, 83 Minn. 149, 86 N. W. 76 (1901), the plaintiff was a carpenter in the employ of defendant company and, while engaged in their duties, he and several other employes were riding on a hand car which was followed by another hand car being operated by other such employes. The rear hand car was defective, in that a handle at its front was broken off and missing. The employes on the rear hand car negligently permitted it to run into the hand car on which plaintiff was riding, and the absence of the handle on the rear car caused plaintiff's car to be derailed, and plaintiff was injured thereby. If the handle on the rear car had not been missing, the collision in all probability would not have caused the derailment and plaintiff's injuries. The handles were not, however, intended to prevent such derailments, but were provided merely to hold by when lifting or moving the hand car. The Court held that failure to have the handle on the rear hand car could be found to be a proximate cause of the injuries for which the defendant was liable.

In **Houston & T. C. Ry. C. v. Kelly,** 35 S. W. 878 (Texas Civ. App. 1896, not officially reported), the action was brought for the death of an employe of the defendant company caused by the wrecking of a train, which the evidence tended to show resulted from a defective wheel, for which the company would be liable, and the fast speed at which the train was run by the engineer, who was a fellow servant of the deceased, and for whose negligence the company would not be liable. The Court held that, even though the fast running of the train through the negligence of the fellow servant contributed proximately to the accident, nevertheless the company was liable for its negligence concerning the defective wheel which was also a proximate contributing cause.

V.

Proximate Cause as Question of Fact.

Of course, under the evidence, it may turn out that the question of proximate cause is a fact to be found by the jury, for, as said by this Court in **Milwaukee & St. Paul Ry. Co. v. Kellogg, 94 U. S. 469** (l. c. 474, 476):

> "The true rule is that what is the proximate cause of an injury is ordinarily a question for the jury. It is not a question of science or of legal knowledge. It is to be determined as a fact, in view of the circumstances of fact attending it. The primary cause may be the proximate cause of a disaster, though it may operate through successive instruments, as an article

at the end of a chain may be moved by a force applied to the other end, that force being the proximate cause of the movement, or as in the oft-cited case of the squib thrown in the market place. * * * In the nature of things, there is in every transaction a succession of events more or less dependent upon those preceding, and it is the province of a jury to look at this succession of events or facts and ascertain whether they are naturally and probably connected with each other by a continuous sequence, or are dissevered by new and independent agencies, and this must be determined in view of the circumstances existing at the time."

VI.

For the injuries sustained by the plaintiff from the collision he manifestly has only one cause of action to recover damages, irrespective of the number of persons that may be liable therefor. And he is only entitled to one satisfaction. If each defendant is liable for the entire damage (as heretofore shown) his right to sue them jointly in Missouri is beyond question. Not only is this the common-law rule in Missouri, but under the Code it is conferred by express statute, to wit:

Vol. 1, Rev. Stat. Mo. 1919, Sec. 1160, p. 483:

"**Who May Be Joined as Defendants.**—Every person who shall have a cause of action against several persons, including parties to bills of exchange and promissory notes, and who shall be entitled by law to one satisfaction therefor, may bring suit thereon jointly against all or as many of the persons liable

as he may think proper; and he may, at his option, join any executor or administrator or other person liable in a representative character, with others originally liable."

However, we do not understand that any contention is made in this case that defendants are not jointly liable provided a cause of action is stated against each of them.

VII.

The rules of code pleading are liberally applied in Missouri and there apparently is no contention that the allegations of plaintiff's petition are not properly and formally pleaded. In **Reuter v. Terminal Railroad Association,** 261 S. W. 713 (Mo. St. Louis Ct. App. 1924, not officially reported), the settled rule as to pleading negligence in Missouri, as well as generally, is reiterated as follows (l. c. 714):

"It is the general rule that in an action based on negligence a petition which describes the act complained of with reasonable certainty and sufficient clearness so as to advise the defendant of the charge he is to meet, and avers generally that the act was negligently done, is sufficient. The term 'negligence' is not, like fraud, a mere legal conclusion, or epithet applied to the act complained of. Negligence is a fact. Bliss in his Code Pleading, at page 331, Section 211a, states the principle as follows:

" 'The general allegation of negligence is allowed as qualifying an act otherwise not wrongful. It is not the principal act charged as having

caused the injury, but it gives color to the act, makes it a legal wrong; it is the absence of care in doing the act. The injury may be the result of accident, of intent, or of negligence. As one's carriage strikes that of his neighbor; if the collision is unavoidable there is no liability, if intentional it is a trespass, if the result of careless driving or other neglect of duty, the liability is for the collision as caused by negligence. Negligence is one of the facts to be pleaded, it is not a conclusion of law, but a conclusion of fact, an issuable, a substantive fact, to be inferred from evidential facts.' "

Notwithstanding the contention made that plaintiff's petition states no cause of action whatever against defendant company, and that no joint cause of action is stated, it is significant that each defendant filed an answer without demurring or otherwise pleading or raising the questions.

Plaintiff in error respectfully submits that there is in the cause no separable controversy authorizing the removal or giving the Court jurisdiction, and that the judgment should be reversed and the cause ordered remanded to the state court, and plaintiff in error prays that it may be done.

JAMES J. O'DONOHOE,
MARK D. EAGLETON,
HARRY S. ROOKS,
Attorneys for Plaintiff in Error.

Office Supreme Court, U. S.
FILED
APR 22 1926
WM. R. STANSBURY
Clerk

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1925.

W. W. HAY,
Plaintiff in Error,
v.
THE MAY DEPARTMENT STORES COMPANY, a Corporation,
and
WILLIAM McCORMICK,
Defendants in Error.
No. 292.

In Error to the District Court of the United States for the Eastern Division of the Eastern District of Missouri.

REPLY BRIEF OF PLAINTIFF IN ERROR.

JAMES J. O'DONOHOE,
MARK D. EAGLETON,
HARRY S. ROOKS,
Attorneys for Plaintiff in Error.

ST. LOUIS LAW PRINTING CO., 415 North Eighth Street. Central 4477.

Cases Cited.

	Page
Alabama Southern Ry. Co. v. Thompson, 200 U. S. 206	3
Brown v. Coxe Bros. & Co. et al., 75 Fed. 689	2
Chicago, R. I. & Pac. Ry. Co. v. Dowell, 229 U. S. 102	2
Chicago, R. I. & Pac. Ry. Co. v. Martin, 178 U. S. 245	2

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1925.

W. W. HAY,
Plaintiff in Error,
v.
THE MAY DEPARTMENT STORES COMPANY, a Corporation,
and
WILLIAM McCORMICK,
Defendants in Error.
No. 292.

In Error to the District Court of the United States for the Eastern Division of the Eastern District of Missouri.

REPLY BRIEF OF PLAINTIFF IN ERROR.

In the brief on behalf of The May Department Stores Company two contentions are made in support of the judgment below:

I.

The first contention is that in plaintiff's petition the defendants are "charged with committing separate and

distinct acts of negligence, some of which affect only the nonresident defendant and others of which affect only the resident defendant," and that, therefore, "no joint cause of action is stated against the two, and a separable controversy is presented which entitled the nonresident defendant to removal" (Defendant's Brief, p. 5).

In **Chicago, R. I. & Pac. Ry. Co. v. Dowell, 229 U. S. 102,** the same situation existed as in this case, and the same contention was made (Brief of Plaintiff in Error, 229 U. S., l. c. 105) to wit:

> "Apart from the allegations of negligence with which the resident defendant was charged, the petition contained other and distinct controversies between the plaintiff and the removing defendant."

The principal cases cited by defendant in error in this case were also cited and relied upon in that case. But this Court held that there was no separable controversy.

In **Chicago, R. I. & P. Ry. Co. v. Martin, 178 U. S. 245,** the action was to recover damages for the death of a person riding as a passenger in one train, caused by its collision with another train. The two trains were operated by different defendants and their duties and the negligence charged against them were necessarily different. The Court held that there was no separable controversy (l. c. 248).

In **Brown v. Coxe Bros. & Co. et al., 75 Fed. 689,** the plaintiff was employed by defendant steamship company

as a watchman on its boat, and while on deck he was injured by the falling of a bucket used and operated by defendant, Coxe Bros. & Co., who were liable for using defective machinery and negligence in its operation, while the steamship company was liable for failure to provide plaintiff with a safe place in which to work and for failure to warn plaintiff of the dangers. *Held*, that there was no separable controversy, and the cause was remanded.

The cases and texts cited in our original brief (Points III and IV, p. 27 et seq.) show that in Missouri, as well as generally, persons are jointly liable for damage resulting from their concurrent negligence, even though their duties and negligent acts or omissions are different.

The certificate in **Alabama Southern Ry. Co. v. Thompson, 200 U. S. 206,** showed that the declaration alleged the resident defendants to be the servants operating the train of the removing defendant. In answering the certified question it was said that, irrespective of whether or not the defendants were jointly liable either under the state law or federal rule, there was no separable controversy; that "a defendant has no right to say that an action shall be several which the plaintiff **seeks** to make joint," or "**elects** to make joint," and that, "conceding the misjoinder of causes of action appeared on the face of the petition, that fact was not decisive of the right of the nonresident defendant to remove the action to the federal court" (l. c. 215). In other cases similar expressions oc-

cur. But we have not thought it necessary to urge these views, being confident that in the case at bar the defendants, under the Missouri law, are jointly liable.

II.

Defendant has cited five cases on the other contention based on proximate cause (Defendant's Brief, p. 6), but those cases dealt with facts entirely different from the facts in this case, and do not appear to us to be sufficiently in point to require discussion. Further, none of them involve the law of Missouri, which, under the settled rule of this Court, is the applicable law on proximate cause decisive of the question presented here.

III.

Counsel for defendants in error (R. p. 13) have not filed a brief on behalf of William McCormick. A separable controversy as to him would, of course, be wholly between citizens of the same state.

Respectfully,

JAMES J. O'DONOHOE,
MARK D. EAGLETON,
HARRY S. ROOKS,
Attorneys for Plaintiff in Error.

FILED
APR 5 1926
WM. R. STANSBURY

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1925.

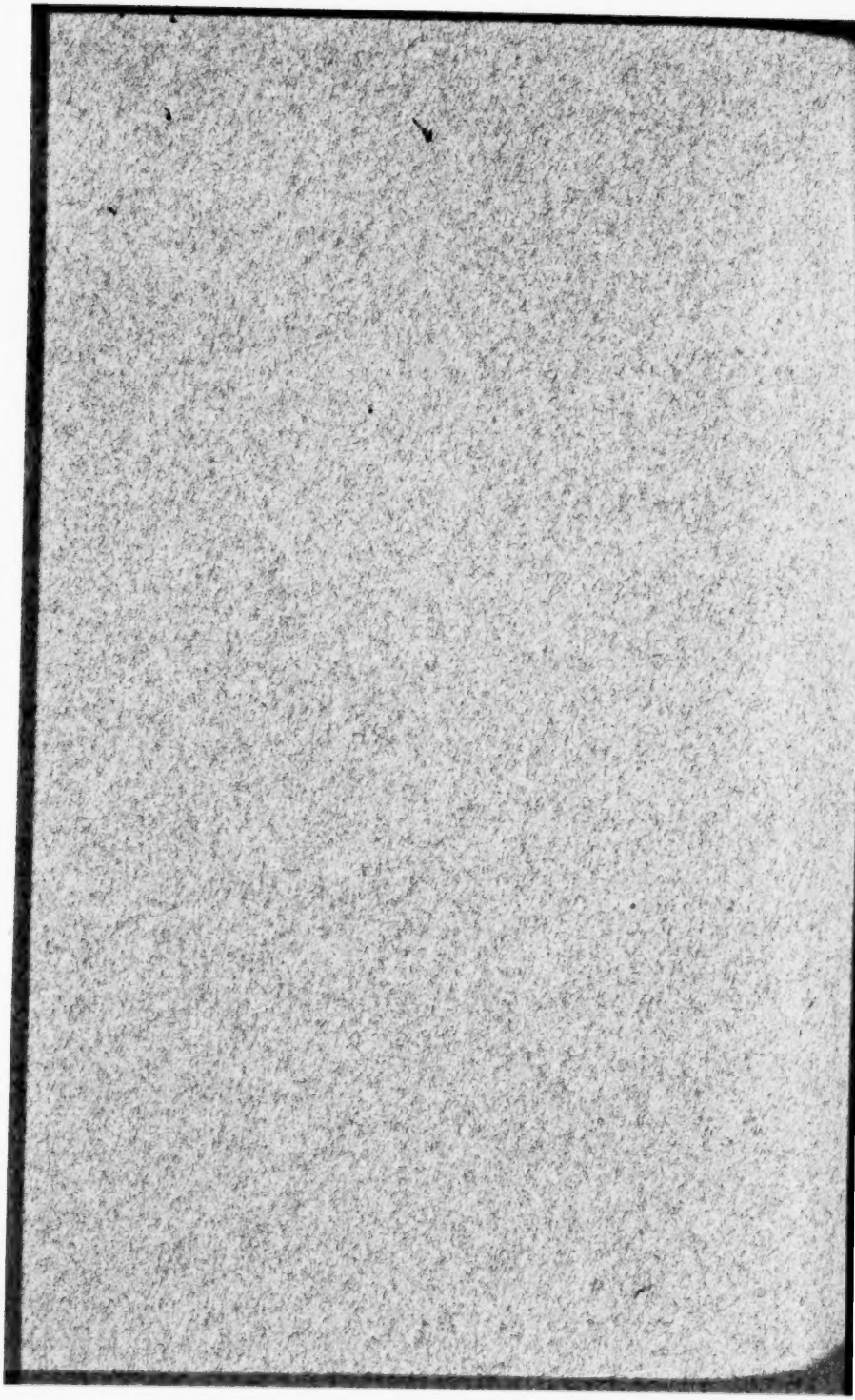
W. W. HAY,
Plaintiff in Error,
v.
THE MAY DEPARTMENT STORES COMPANY, a Corporation,
and
WILLIAM McCORMICK,
Defendants in Error.
} No. 292.

In Error to the District Court of the United States for the Eastern Division of the Eastern Judicial District of Missouri.

BRIEF OF THE MAY DEPARTMENT STORES COMPANY, ONE OF THE DEFENDANTS IN ERROR.

ROBERT A. HOLLAND, JR.,
JACOB M. LASHLY,
Attorneys for The May Department Stores Company, One of the Defendants in Error.

ST. LOUIS LAW PRINTING CO., 415 North Eighth Street. Central 4477.



SUBJECT INDEX.

Page

Table of cases ii

Statement of the case 1-4

Summary of argument 5-6

Argument 7-48

I (a) Separable controversy, because no joint cause of action stated in the petition 7

II (b) Separable controversy, because from the averments of the petition it appears that the sole proximate cause of the injuries complained of was negligence on the part of the resident defendant 22

Table of Cases.

Adderson v. Southern Railway Company et al., 177 Federal Reporter, 571 13
Bainbridge Gro. Co. v. Atlantic Coast Line Railroad Company et al., 182 Federal Reporter, 276 13
Cayce v. Southern Ry. Co. et al., 195 Federal Reporter, 786 10
Cole v. German Savings & Loan Society, 124 Federal Reporter, 113 26
Evansberg v. Insurance Stove, Range and Foundry Company, 168 Federal Reporter, 1001 16
Fergason v. Chicago, Milwaukee & St. Paul Ry. Co. et al., 63 Federal Reporter, 177 17
Graeff v. Phil. R. R. Co., 161 Penn. St. 230 38
Grimm v. Globe Printing Company, 232 S. West. Reporter, 676 (not reported in the State Reports) 19
Nichols v. Chesapeake & Ohio Railway Company, 195 Federal Reporter, 913 ..... 9, 11
Parkington v. Abraham, 93 Appellate Division 359 (Sup. Ct. of N. Y.), 183 N. Y. 553 24
Shaver v. Pacific Coast Condensed Milk Company et al., 185 Federal Reporter, 316 12
Smith v. Johnson, 219 Mass. 142 46
Teis v. Smuggler Mining Co., 158 Federal Reporter, 260 28

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1925.

W. W. HAY,
Plaintiff in Error,
v.
THE MAY DEPARTMENT STORES COMPANY, a Corporation,
and
WILLIAM McCORMICK,
Defendants in Error.
No. 292.

In Error to the District Court of the United States for the Eastern Division of the Eastern Judicial District of Missouri.

BRIEF OF THE MAY DEPARTMENT STORES COMPANY, ONE OF THE DEFENDANTS IN ERROR.

STATEMENT OF THE CASE.

The plaintiff in error in his "Statement" states that the petition was filed in the State Court against The May Department Stores Company, a corporation, and William McCormick, as **joint** defendants to recover for bodily injuries therein alleged to have been caused by **joint** negligence of the said defendants. We take issue with said statement in so far as it says that the said parties were sued as "joint defendants." They were sued

as co-defendants, but we claim that they were not sued as "joint defendants." We also take issue with the said statement in so far as it says that the petition filed by plaintiff in error in the State Court alleged that the injuries complained of were caused by "joint negligence of the defendants." We contend, and hereinafter point out, that the said petition avers no acts of negligence for which the two defendants were **jointly** liable. Said petition filed alleged no acts of negligence for which both defendants could be held liable. It avers that plaintiff in error was pushing a truck and that William McCormick, the resident defendant, was pushing another truck behind that of plaintiff in error. **It clearly appears from the averments of the petition that plaintiff in error and said William McCormick, the resident defendant, were fellow servants.** Under the averments of the petition filed in the State Court, The May Department Stores Company stood in the relation of master to the plaintiff in error, and the resident defendant, William McCormick, occupied the position of fellow servant to the plaintiff in error. Said petition is set out in the Record and in the Brief of plaintiff in error, and it is unnecessary to set it out here in any great detail. The **Removal Petition** of The May Department Stores Company avers that the petition filed by the plaintiff in error in the State Court states no **joint** cause of action against the two defendants and therefore, presents a separable controversy. This for the following reasons: The said

petition filed by the plaintiff in error in the State Court avers that the plaintiff in error was injured by reason of negligence on the part of said The May Department Stores Company in failing to furnish plaintiff in error a reasonably safe place to work, and in employing a co-servant, the resident defendant, in that the latter was frequently negligent in pushing trucks too rapidly, etc. On the other hand, as to the resident defendant, William McCormick, the said petition charges that he was negligent in the actual handling of a truck (R. pp. 6-8).

In the first place, the charge of negligence against the said The May Department Stores Company in no way affects the resident defendant, for the latter was not an employer of the plaintiff in error and owed him no duty to furnish a reasonably safe place to work. And the charge of actual negligence on the part of the resident defendant in no way affects the defendant, The May Department Stores Company, because the petition recites facts from which the conclusion is inevitable that the plaintiff in error and the resident defendant were fellow servants, and the defendant, The May Department Stores Company, could not be held for any negligence of the resident defendant. In the second place, the petition filed in the said State Court states no joint cause of action against the defendant, The May Department Stores Company, and the resident defendant, because in the last analysis, under the averments thereof, whatever negligence may have previously been committed by The May Depart-

ments Stores Company and the resident defendant, the **proximate cause** of the collision of the trucks and the alleged injury to plaintiff was the negligent act of the resident defendant, in that while he was propelling a truck along a passageway, he saw, or by the exercise of ordinary care would have seen, that the truck which plaintiff in error was driving ahead of him had been stopped in time by the exercise of ordinary care to have stopped his truck and avoided striking same.

SUMMARY OF ARGUMENT.

I.

Where a suit for personal injuries is filed in a State Court against two defendants, and each is charged with committing separate and distinct acts of negligence, some of which affect only the non-resident defendant and others of which affect only the resident defendant, no **joint cause of action** is stated against the two, and a **separable controversy** is presented which entitled the non-resident defendant to removal.

Cayce v. Southern Ry. Co. et al., 195 Federal Reporter, 786;

Nichols v. Chesapeake & Ohio Railway Company, 195 Federal Reporter, 913;

Shaver v. Pacific Coast Condensed Milk Company et al., 185 Federal Reporter 316;

Bainbridge Gro. Co. v. Atlantic Coast Line Railroad Company et al., 182 Federal Reporter, 276;

Adderson v. Southern Railway Company et al., 177 Federal Reporter, 571;

Evansberg v. Insurance Stove, Range and Foundry Company, 168 Federal Reporter, 1001;

Fergason v. Chicago, Milwaukee & St. Paul Ry. Co. et al., 63 Federal Reporter, 177;

Grimm v. Globe Printing Company, 232 S. West. Reporter, 676 (not reported in the State Reports).

II.

In the petition for personal injuries filed in the State Court against the two defendants, it appears from the averments of the petition that the **sole proximate cause** of the alleged injuries was an alleged act of negligence on the part of one of said defendants, that being so, no **joint cause of action** is stated against the two defendants and, therefore, a separable controversy is presented which entitles the non-resident defendant to the removal of the case.

Smith v. Johnson, 219 Mass. 142;
Graeff v. Phil. R. R. Co., 161 Penn St. 230;
Cole v. German Savings Society, 124 Federal Reporter, 113;
Parkington v. Abraham, 93 Appellate Division 359 (Sup. Ct. of N. Y.), and 183 N. Y. 553;
Teis v. Smuggler Mining Co., 158 Federal Reporter, 260.

ARGUMENT.

I.

A separable controversy is presented between the plaintiff in error and The May Department Stores Company, one of the defendants in error, because the petition filed in the State Court by the plaintiff in error states no **joint cause** of action against the two defendants. The Removal Petition shows that the plaintiff in error was a citizen and resident of the State of Missouri; that the The May Department Stores Company was a citizen and resident of the State of New York; and the other defendant, William McCormick, was a citizen and resident of the State of Missouri (Rec., pp. 6-8). **The petition filed by the plaintiff in error in the State Court states no joint cause of action against the two defendants.** Hence, a separable controversy was presented between the said plaintiff and the said The May Department Stores Company, and the latter, being a nonresident of the State of Missouri, was entitled to removal. The said petition states no joint cause of action against said two defendants because it contains no averments of any act or acts of negligence for which both defendants could be liable. **As to The May Department Stores Company,** the petition in substance charges that the said Company was negligent in failing to furnish plaintiff in error a **reasonably safe place to work,** and in employing and furnishing a fellow servant who frequently was negligent in pushing trucks rapidly, etc. **As to the resident defendant,** the petition

charges in substance that he was negligent in the actual handling of a truck. The charges against the Company in no way affect the resident defendant, for the latter owed plaintiff no duty to furnish a reasonably safe place in which to work. And the charges of negligence on the part of the resident defendant in no way affect the Company, because the plaintiff and the resident defendant were **fellow servants** of the Company, and the Company could in no way be held liable for any negligent acts of the said resident defendant. It is to be noted that this case is utterly unlike **Chesapeake & Ohio Railway Co. v. Dixon**, 179 U. S. 131, 40 L. Ed. and **Ala. Great Southern Ry. Co.** v. **Thompson**, 200 U. S. 206, 50 L. Ed. 441. For in those cases the petitions charged that the railroad company and its employes were guilty of committing **the same acts** of negligence, the employes being liable for said acts because they did the very acts complained of, and the Companies being liable for such acts under the principles of agency. Moreover, in those cases the fellow-servant situation was absent. In the instant case there is no averment of any act or acts of negligence **committed by both defendants** for which both could be held liable to the plaintiff in error. The petition, therefore, presented a separable controversy between the said plaintiff in error and the nonresident defendant, as to whether the latter failed to discharge any duties owed by a master to a servant in furnishing the latter a reasonably safe place to work and reasonably proper fellow servants. And this is entirely

distinct and separate from the controversy presented between the plaintiff in error and the resident defendant as to whether the latter was guilty of negligence in the actual handling of the truck. Counsel contend that if under the rules of practice of the State Court the two defendants are **properly joined**, there can in the nature of things be no separable controversy. But obviously this is not the test. The books are full of cases where defendants were properly joined under the practice of a State Court, and where it was yet held that a separable controversy was involved. For the test is not whether the defendants were **properly** joined, but whether the petition states a **joint cause** of action against them. As was said in Nichols v. C. & O. Railway Company, 195 Federal Reporter, 913 (C. C. A. 6th Circuit):

> **"Different rights of action may, it is true, often be joined in one suit, but this does not make them inseparable. The existence of the 'separable controversy' right of removal presupposes that it may be found joined in one action with another controversy."**

Now, it is clear that the resident defendant, a mere fellow servant of plaintiff, owed him no duty to furnish him a safe place to work and a reasonably proper fellow servant. The averments of negligence, in reference to a safe place, therefore, affect only the defendant, The May Department Stores Company, the employer of the plaintiff in error. On the other hand, the charges of negligence

contained in the petition as to the alleged acts of negligence of the resident defendant, plaintiff's fellow servant, obviously affect the resident defendant alone and do not affect The May Department Stores Company, because the latter cannot be held liable for any alleged acts of negligence on the part of a fellow servant. As we read the petition, the only act of negligence that both defendants were charged with is to the effect that on the occasion in question when the plaintiff's truck was stopped, the defendants saw, or by the exercise of ordinary care could have seen it stopped in time to have avoided a collision. But this averment obviously states no cause of action against The May Department Stores Company, employer of the plaintiff in error, for such negligence, if committed, was clearly merely an act of negligence on the part of a fellow servant.

In **Cayce v. Southern Ry. Co.**, 195 Federal Reporter 786, a declaration against a railroad company and a conductor and operator employed by the company, alleging negligence of the company in running a train at a high rate of speed, without proper lookout, and charging defendant employes' negligence to have consisted in placing freight cars on the main line, where they collided with a passenger train, it was held that there was a separable controversy between the plaintiff and the railway company. There the Court said:

> "The Southern Railway Company, through its servants and employes, is alleged to have been neg-

ligent in running (while being behind time) at a high rate of speed, and not having 'a proper lookout ahead.' The individual defendants were negligent in placing the freight cars on the main line. I think the two grounds of negligence are entirely separate and distinct, and upon the authority of the cases cited above and upon the general rule, the controversy of the plaintiff with the Southern Railway Company is a separable controversy."

In **Nichols v. C. & O. Railway Co.**, 195 Federal Reporter 913, decided by the Court of Appeals for the Sixth Circuit, action was brought against a railroad company and an employe. The plaintiff was a brakeman. One act of negligence is charged against the individual defendant, who is the engineer of a train, and another against defendant, growing out of violation of a statute. The Court held that there was a separable controversy. There the Court says:

"**It seems necessarily to follow that, where there are separate or distinct causes of action, there must be separate controversies. Each cause of action must present a controversy. Different rights of action may, it is true, often be joined in one suit, but this does not make them inseparable. The existence of the 'separable controversy' right of removal presupposes that it may be found joined in one action with another controversy.** In the present case, even if the cause of action is not 'separate,' yet the 'separable' character of the claim under the statute is made clear by the fact that one of the defendants has no concern

with this question. We are satisfied that the second removal petition conferred jurisdiction on the federal court (Jackson v. C. R. I. & P. Ry. Co., 178 Fed. 432, 102 C. C. A. 159), and that the action which has been commenced in March and was then pending in the state court upon the amended July petition was, for the first time, effectively removed."

In **Shaver v. Pacific Coast Condensed Milk Co. et al.**, 185 Federal Reporter 316, the plaintiff sought to recover for the death of his son caused by an elevator accident. He alleged as against the nonresident corporation, defendant, that the elevator was not properly constructed and guarded, and also alleged that the resident defendant, a foreman, had ordered the deceased to operate the elevator. There the Court says:

"The motion to remand will be overruled. I doubt whether the complaint upon its face states a joint cause of action against the nonresident corporation and Smith. It is skillfully drawn, but, omitting the unnecessary verbiage and disregarding the conclusions of law and the repeated assertions that 'the defendants' did so and so, **the facts charged against the defendant corporation are that it employed the deceased, a lad about 14 years of age, to operate an elevator, in violation of the act of the Legislature of 1909 (Laws Or. 1909, p. 103), and that the elevator was not properly constructed and guarded. Neither of these facts would make the defendant Smith liable jointly with his codefendant.** It is not shown that he owed any duty to the deceased in either regard. The

averment that he was foreman of the defendant corporation, and ordered and directed the deceased to operate the elevator, might possibly render him liable under the statute, a question I do not assume to decide; but, if so, it would be a separate liability from that of his codefendant, unless he acted by the direction or in the presence of the master, which is not alleged (Prince v. Ill. Cent. R. R. [C. C.], 98 Fed. 1; Shaffer v. Union Brick Co. [C. C.], 128 Fed. 97). The allegation that 'the defendants' did so and so adds nothing to the charge of negligence actually made (Chicago, R. I. & P. v. Stepp [C. C.], 151 Fed. 908; Gustafson v. Chicago, R. I. & P. [C. C.], 128 Fed. 85; Helms v. N. P. Ry. [C. C.], 120 Fed. 389)."

In **Bainbridge Gro. Co. v. Atlantic Coast Line R. Co. et al.**, 182 Federal Reporter 276, plaintiff alleged that his warehouse was caused to be burned by a spark from an engine. It alleged that the warehouse was burned by the joint negligence of the railroad company and the engineer, the individual defendant; and also alleged that the burning was due to negligence on the part of the railroad company in failing to properly equip its engine, and against its engineer for improperly handling the same. It was held that there was a separable controversy as to the railroad company.

In **Adderson v. Southern Ry. Co. et al.**, 177 Federal Reporter 571, plaintiff alleged that injuries were due to joint negligence on the part of the railway company and the conductor and engineer. **The negligence alleged against**

the company was for employing an incompetent engineer, and the negligence alleged against the employe was negligence in operation. The Court held that there was a separable controversy as to the railway company. There the Court says:

> "An action was brought by Edwards, an employe of the Southern Railway Company, against it and Russell, one of its engineers, for personal injuries which Edwards suffered in consequence of having been struck by a lump of coal which fell from the tender of a passing locomotive of which Russell was in charge. The company, which is a nonresident of this state, is here upon a bill of exceptions assigning error upon the refusal of the trial court to grant an order removing the case to the federal court. The plaintiff in his petition alleges that both the company and Russell were guilty of a number of specified acts of negligence, one of which was overloading the tender with coal. It is in one paragraph of the petition also alleged that the company was negligent 'in not providing said engine with an engineer who was careful and prudent, and who would not have permitted said tender to be thus overloaded.'
>
> "In Railway Co. v. Dixon, 179 U. S. 131 (21 Sup. Ct. 67, 45 L. Ed. 121), it was held that: 'When concurrent negligence is charged, the controversy is not separable.' The decision in this case, therefore, seems to be authority for the proposition that, in so far as related to the joint acts of negligence, the case made by the plaintiff's petition would not be one which could properly be removed to the United States court.

Be that as it may, however, we are quite confident that, because of that paragraph of the petition specially mentioned above, the cause was removable. **That paragraph certainly did not charge an act of 'concurrent negligence,' for it cannot be true that the company's negligence in providing a careless and incompetent engineer was an act in which the latter participated.** Indeed, the plaintiff does not undertake to allege that this was so, but makes his charge of negligence with respect to employing an incompetent engineer against the company alone. As to this particular matter, therefore, there was a 'separable controversy' between the plaintiff and the company. The alleged negligent act of employing such an engineer, with resulting damages to the plaintiff, would, in and of itself, have given rise to a distinct cause of action involving a controversy wholly between citizens of different states, and a suit of this kind would certainly have been removable. It makes no difference that in the present case such a controversy exists in connection with others that may not be separable. The fact that there is in the suit 'a controversy which is wholly between citizens of different states, and which can be fully determined as between them,' brings the case within the Removal Act of 1887 (24 Stat. 552, c. 373 [U. S. Comp. St. 1901, p. 508]; Black's Dillon's Removal of Causes, Sec. 139. See, also, Sec. 139 and cases cited). That there is a separable controversy must appear from plaintiff's pleadings (Id., Sec. 141). When removal is proper, the effect is to carry the entire case into the federal court (Id., Sec. 142).

"The Court erred in not granting the order of removal."

In **Evansberg v. Insurance Stove, Range & Foundry Co.**, 168 Federal Reporter 1001, the plaintiff brought an action against the nonresident corporation that employed him, and joined a superintendent, who was an employe of the nonresident corporation. **The charge against the corporation was that it was negligent in providing a defective appliance; and the charge against the individual defendant was that he directed plaintiff to pour molten iron into the defective appliance.** The Court held that there was separable controversy as to the corporation. The Court says:

> "But the petition for removal does present a good ground of removal, in that the petition does not present a joint cause of action, but does present a separable controversy. This is so even if it be assumed that it presents a cause of action against defendant Breiner. **The ground of removing defendants' liability, if any, is either that it negligently provided a defective appliance, or that it is liable for defendant Breiner's negligence in directing him to pour the iron into the mold knowing that it was defective.** The defendant Breiner is not liable to the plaintiff on the first ground, because he was under no duty to furnish plaintiff with a safe appliance. If it be conceded that he is liable on the second ground, the liability of both defendants because thereof is not joint. It is a separate liability as to each (Warax v. C. N. O. & T. P. Ry. Co. [C. C.], 72 Fed. 637; Hukill v. M. & B. S. R. R. Co. [C. C.], 72 Fed. 745). This is not a death case, and I do not understand that the authority of these cases in nondeath cases has yet been overthrown."

In **Fergason v. Chicago, M. & St. P. Ry. Co. et al.**, 63 Federal Reporter 177, the plaintiff alleged that he was injured while acting as a switchman in the employ of the railway company. **As against the corporation, he alleged his injuries were due to negligence in furnishing an improperly constructed engine. He alleged negligence against the individual defendants in that they negligently failed to keep proper lockout and to give proper signals.** The Court held that there was a separable controversy as to the railway company. There the Court says:

> "It is clear, in the present case, that the plaintiff counts upon the legal duty of the railway company to furnish for the use of its servants machinery and appliances properly constructed and equipped, and avers as a breach of this legal duty that the engine was not built for switching purposes, and was not properly equipped with railings, catch-rods, etc. If the company had come short of its duty in this respect, and the plaintiff suffered injury by reason thereof, then a right of action existed in favor of plaintiff, based upon the cause named, to wit, the failure of the master, in the performance of its duty, to furnish proper machinery and appliances for the use of its employes. The petition does not, nor could it rightfully, charge the engineer or yardmaster with this duty, and with the consequence of a breach thereof. These men were but coservants with the plaintiff, and were under no legal obligation to furnish any machinery for his use. It is certainly clear that if the plaintiff had sued the engineer or yardmaster alone, and had based his action upon the aver-

ment that the engine was not properly equipped, he could not recover, because it could not be shown that they were under any legal obligation to furnish a safely equipped engine for his use. That was the obligation of the master, and not of the coservant. The petition in fact counts upon two causes of action: one, the failure to furnish a properly equipped switch engine; the other, negligence in the handling of the engine after plaintiff had been thrown upon the track. The first cause named exists only against the railway company, and is wholly distinct from the second cause of action. **If it be true that the engine was not properly constructed, and was lacking in appliances needed for the safety of the men employed thereon, then this breach of duty existed from the time the engine was put to work as a switch engine: and thus a cause of action existed against the company from that time, which would ripen into a right of action in favor of an employe whenever such employe received injury by reason thereof. The cause of action for the negligent handling of the engine and failure to exercise a proper lookout did not arise and was not in existence until the parties in charge of the engine undertook to move the engine along the track upon which plaintiff was injured. The first cause of action is based upon alleged negligence of the master in failing to furnish proper machinery; the second upon alleged negligence of the coservants of the plaintiff in the handling of the engine.** Under the rules of the common law, the first is a cause of action against the railway company, but the second is not. The first cause is therefore based upon the legal duty, imposed by the common law upon the master, but not upon the employes, of furnishing safe machinery for

the use of its servants, whereas the second cause, so far as the railway is concerned, is based upon the statute of Iowa, which makes the railway company liable, under given circumstances, for the negligence of its servants resulting in injury to a co-employe. It seems clear, therefore, that this suit is clearly separable into parts, and, in fact, upon the trial, must be so separated; and that, when thus separated, there is presented a controversy between the plaintiff and the railway company over the question whether the engine used for switching purposes in the yard at Sioux City was or was not properly constructed and equipped, and to this controversy the defendants Smith and Pollard are not parties. If this be true, then, as the suit involves a controversy wholly between citizens of different states, it was properly removed by the defendant company, and the motion to remand must be overruled."

That the petition in this case states no **joint** cause of action against the defendants in the State of Missouri is definitely indicated by a decision emanating from the Supreme Court of the State of Missouri in the case of **Grimm v. Globe Printing Co., 232 Southwestern Reporter 676** (not reported in the State Reports). There the plaintiff's decedent, an employe of Robert Ziegler & Sons, was engaged in moving a furnace in the premises of the defendant, Globe Printing Company. The furnace was moved on rollers to an elevator and on signal the elevator was brought to the proper floor. Decedent and one Kolaks started to roll the furnace into the elevator, and while so

doing the elevator started down, with the result that plaintiff's decedent was killed. Plaintiff instituted suit against Ziegler & Sons and against the Globe Printing Company. Later on plaintiff accepted $500.00 from Ziegler & Sons, and in consideration thereof executed a paper by which she agreed to dismiss the suit as to said Ziegler & Sons and never to reinstitute the same, or never to bring another suit against said Ziegler & Sons. The cause proceeded to trial against the Globe Printing Company. By way of defense the Globe Printing Co. claimed that the $500.00 received by plaintiff from Ziegler & Sons should be considered in the reduction of damages. At that time there was a law in force in the State of Missouri known as Section 4223, Revised Statutes of Missouri 1919. Said section is as follows:

> "Sec. 4223. **Contribution.**—Defendants in a judgment founded on an action for the redress of a private wrong shall be subject to contribution, and all other consequences of such judgment, in the same manner and to the same extent as defendants in a judgment in an action founded on contract. It shall be lawful for all persons having a claim or cause of action against two or more joint tort-feasors or wrongdoers to compound, settle with and discharge any and every one or more of said joint tort-feasors or wrongdoers for such sum as such person or persons may see fit, and to release him or them from all further liability to such person or persons for such tort or wrong, without impairing the right of such person or persons to demand and collect the balance

of said claim or cause of action from the other joint tort-feasors or wrongdoers against whom such person or persons has such claim or cause of action and not so released."

There the Court says:

"Defendant claims error in the refusal of the trial court to instruct the jury that $500.00 received by her from the Zieglers should be considered in reduction of damages. **Laws of 1915, p. 268, cited by appellant, have no application, as we view the matter, because that act applies only in the case of joint-tort-feasors or joint wrongdoers.** The evidence in this case fails to show joint liability between Ziegler & Sons and the Globe Printing Company for the death of deceased. The payment by Zieglers of $500.00 for a dismissal of the case with an agreement that no further suit should be brought under the facts in this case does not come within the meaning of Acts 1915, p. 268 (Sec. 4223, R. S. 1919). It is no concern of defendant if Zieglers are willing to pay for a dismissal of a case wherein they were not jointly liable. The reference made by appellant to 34 Cyc 1089 is there said to apply to releases as between co-wrongdoers. A stipulation quite similar to the one before us was held not to be a release as a matter of law (Arnett v. Railway Co., 64 Mo. App. 368)."

Moreover, it should be borne in mind that the State Court, in making the order of removal, presumptively held that the petition stated no joint cause of action against the defendants.

II.

The petition states no joint cause of action against The May Department Stores Company, the removing defendant, and William McCormick, the resident defendant, because under all the averments of the petition it is clear that the **sole proximate cause** of the alleged injuries to plaintiff was the negligence of the resident defendant, in that after plaintiff's truck had been suddenly stopped, the said resident who was propelling a truck behind him saw, or by the exercise of ordinary care would have seen that plaintiff's truck was so stopped in time by the exercise of ordinary care to have averted the collision. This precise phraseology is not used in the petition, but the said averments are implied in the general averments of the petition to the effect that "defendants negligently failed to stop or divert the truck so as to avoid the collision" (Rec., p. 4). After the truck of the plaintiff in error was stopped, the defendants negligently failed to stop or divert another truck so as to avoid a collision clearly alleges by implication that the defendants saw, or by the exercise of ordinary care would have seen, the truck so stopped in time by the exercise of ordinary care to have avoided colliding with same. As we read the petition, this is the only averment of any single act as against both defendants. **But it is obvious that it states no cause of action against The May Department Stores Company, the employer of plaintiff in error, because the**

resident defendant, who was handling said truck and committed said alleged act of negligence was a fellow servant of plaintiff. We respectfully submit, therefore, that under all the allegations of the petition, the averment that the resident defendant saw, or by the exercise of ordinary care would have seen the truck of plaintiff stop in time by the exercise of ordinary care to avoid colliding with same, discloses that **the sole proximate cause** of the alleged injuries of the plaintiff in error was the said alleged negligence on the part of the resident defendant. **Cause proxima non remota spectatur.** The earlier averment that the employer was negligent in having the passageway littered with debris becomes immaterial in the light of the said alleged negligence of the resident defendant. For it is entirely immaterial as to what was the occasion of the plaintiff in error stopping his truck. For such cause would not be the proximate cause of the injury. For the petition, after averring that the passageway was strewn with debris, sets up in effect that when plaintiff's truck was stopped on account of the debris the conditions were such that the resident defendant coming up behind him saw, or by the exercise of ordinary care would have seen, the truck so stopped in time by the exercise of ordinary care to have avoided colliding with same. And the averment that the resident defendant was addicted to driving his truck too fast becomes utterly immaterial, because there is no averment that he was **incompetent** to handle this truck. On the contrary, the

ultimate averment above referred to by implication states that this **very resident defendant** was a man of such make-up that he himself on this very occasion saw, or by the exercise of ordinary care would have seen the first truck so stopped in time by the exercise of ordinary care to have avoided striking the same. It should be noted that said averment is not to the effect that some other more competent person could have so avoided the collision, but that this very defendant by the exercise of ordinary care could have done so. That the said act of the resident defendant under the averments of the petition was the **sole proximate cause** of the injuries complained of we think is sufficiently shown from the following authorities:

In **Parkington v. Abraham, 93 Appellate Division,** p. 359, Supreme Court of New York, plaintiff was injured while using a swinging door in a department store. The injury was due to the fact that some other customer improperly handled a swinging door.

The Court held that there was no right of recovery. There the Court said:

> "Willard, Bartlett, J.:
>
> "The plaintiff was injured by being struck by a swinging door, as she was coming out of the department store of the defendants. In her complaint she alleges that 'in consequence of the negligent, unsafe and improper construction, arrangement and management of said door and of the springs attached thereto, said door swung back with great and dangerous force

and struck the plaintiff a violent blow on the head and body.' She testifies that as she started to go out the door was open, and just as she started to go out and had reached the sill, a woman who was ahead of her left the door and it flew back and knocked her down. The only other witness who testifies to actually having seen the accident was at the time a footman in the service of the defendants. He described what happened as follows: 'At the time she was struck neither of the doors was fastened back in any way. They were both swinging, unless in the warm weather they would be fastened back. I saw the person who came in just before her. She was a lady, and I saw her push the door in full force, and the other lady that was coming out she was like turned and looking at something in the show window and the door struck Mrs. Parkington.' **It is quite apparent from all of the testimony concerning the occurrence that the motion of the door at the time it hit the plaintiff was due to the action of some other visitor to the store, who pushed open the door and let it swing back upon the plaintiff just as she reached the threshold.**

"For this action the defendants are not responsible, nor does it seem to me that they can be held liable for negligence on the ground that the construction or arrangement or management of the swinging doors was improper or unsafe. The proof showed that similar doors, with springs of the same or greater strength, are in use on numerous like establishments in the Borough of Brooklyn and the Borough of Manhattan. There does not appear to be anything about their construction or operation to make them dangerous to the customers of a department store, provided

ordinary and reasonable care is exercised in their use. That it is possible to use them so as to injure others is demonstrated by this very accident, but carelessness in the use of any form of door may inflict injury upon one who happened to be sufficiently near it.

"No doubt the plaintiff has been the victim of a lamentable accident, but it is attributable, as it seems to me, not to any fault of the defendants, but rather to the hasty carelessness of a third person over whose movements and conduct they had no control.

"In my opinion, therefore, the plaintiff has failed to make out a cause of action, and the defendants are entitled to a reversal of the judgment."

This judgment was subsequently affirmed by the Court of Appeals of New York in 183 N. Y., p. 553.

In **Cole v. German Savings & Loan Society,** 124 Fed. Rep. 113, decided by the Circuit Court of Appeals, Eighth Circuit, the defendant maintained a building with an elevator shaft and elevator therein. The elevator was at one of the upper floors of the building. The gate at the shaft of the first floor of the building was not provided with a lock and was left slightly open, and it was somewhat dark in the vicinity of the said elevator. A boy who was an entire outsider came into the building and opened the gate. The plaintiff, thinking the boy was connected with the premises and had some right to open the gate, immediately ran into the opening and stepped into the shaft and was injured. The Court held that the sundry acts of negligence alleged on the part of the defendant in con-

nection with the elevator, to wit, the failure to have a lock thereon and failure to have a light thereon, were not the proximate cause of the plaintiff falling into the elevator shaft, but the sole **proximate** cause was the act of the trespassing boy in deliberately opening the gate. There the Court, through Judge Sanborn, says:

> "**The crucial question in this case is whether or not the negligence of the defendant was the proximate cause of the injury of the plaintiff**, so that, in the legal acceptance of that term, it contributed to her hurt. 'Causa proxima, non remota, spectatur,' and those damages which are the result of remote causes form a part of that large mass of resulting losses styled 'damnum absque injuria,' for which the law permits no recovery.
>
> * * * * * * * *
>
> "Try this case by any of these tests and the result is the same. The independent voluntary act of the strange boy who opened the door of the elevator and invited the plaintiff to enter the well was incapable of anticipation. * * * It broke the chain of causation between the prior negligence of the defendant and the injury of the plaintiff, insulated the defendant's acts and omissions from the plaintiff's hurt and imposed upon the boy who willed and committed the act which produced the injury the sole liability for the damages which resulted from it. The acts and omissions of the defendant were too remote to legally contribute to the injury or to impose liability for it. They were not a proximate cause of the accident, and the mischievous and wrongful act of the

strange boy was the sole moving, efficient, proximate cause that produced it (Railroad Co. v. Barry, 84 Fed. 944, 950, 28 C. C. A. 644, 650, 43 L. R. A. 349; Railroad Co. v. Elliott [U. S.], 55 Fed. 949, 952, 5 C. C. A. 347, 350; Finlayson v. Milling Co., 67 Fed. 507, 512, 12 C. C. A. 492, 496; Railway Co. v. Bennett, 69 Fed. 525, 16 C. C. A. 300; Railway Co. v. Callghan, 56 Fed. 988, 993, 6 C. C. A. 205, 210; Railway Co. v. Moseley, 57 Fed. 921, 926, 6 C. C. A. 641, 646; Insurance Co. v. Melick, 65 Fed. 178, 184, 12 C. C. A. 544, 550, 27 L. R. A. 629; Goodlander Mill Co. v. Standard Oil Co., 63 Fed. 400, 11 C. C. A. 253; Laidlaw v. Sage, 158 N. Y. 73, 98-102, 52 N. E. 679, 44 L. R. A. 216; Trewatha v. Milling Co., 96 Cal. 494, 500, 28 Pac. 571, 31 Pac. 561; Ayers v. Rochester Ry. Co., 156 N. Y. 104, 108, 50 N. E. 960; Doherty v. Waltham, 4 Gray, 596; Parker v. Cohise, 10 Hund. 531)."

In **Teis v. Smuggler Mining Co.**, 158 Fed. Rep. 260, decided by the Circuit Court of Appeals, Eighth Circuit, plaintiff was working for defendant in a mine in which gas was escaping. Plaintiff was prostrated. Coservants took the plaintiff to an elevator and laid him on the floor of the elevator. When he reached the surface it was discovered that one of plaintiff's legs at the ankle was broken. It was contended by plaintiff that the gas was the proximate cause of the plaintiff's leg being hurt in the elevator. But the Court held against this contention. There the Court says:

"Without undertaking to review the mass of authorities bearing on this vexed question, it is suffi-

cient to say that they range themselves along two lines, closely allied, but more or less divergent. The one asserts that when several concurring acts or conditions of things—one of them the wrongful act of the defendant—produce the injury, and it would not have been produced but for such wrongful act or omission, it is the proximate cause of the injury. From this postulate the plaintiff's counsel argues that but for the gas in the mine the plaintiff would not have been rendered helpless, so as to have been exposed to the supervening negligent act of the men in so placing him in the elevator cage so as to leave his leg extending beyond the outside thereof, whereby it came in contact with the timbers, and therefore the negligent act of exposing him to the gas was a continuing, unbroken cause. This, it seems to us, is the argument post hoc proctor hoc. It runs back to the first wrongdoer, no matter how many supervening or intervening causes. It admits of no break in the chain of causation, because it is builded on the presumption that but for the first negligent act the person injured might not have come into the position where the supervenient cause, although put in motion by a force entirely independent of the first, smote the party to his injury. Carried to its logical sequence, where A should wrongfully eject B from his house at a time when the sky was clear, if a storm should suddenly arise and a flash of lightning should kill B, his death would be the proximate cause of the act of ejection. Opposed to this doctrine is the line of authorities asserting the rule to be that, where the negligent act of the defendant is not wanton, the law attaches responsibility to it for all the consequences which ensue directly therefrom, and for such effect

as, in the natural order of sequence, follows therefrom, no matter how remote in point or time or distance, limited by the requirement that the ultimate result must be such as that a reasonable person should anticipate that in the natural order of things would probably ensue. **Whenever this causal connection between the negligent act and the ultimate injury is interrupted by reason of the interposition of some independent force or human agency, acting independently of the first act, but for which the ultimate injury would not have come, the former is the remote and the latter is the proximate cause.** This is very aptly expressed by Wharton thus:

"'The intervener acts as a nonconductor and insulates the negligence.'

"The philosophy of the responsibility for a negligent act is that the wrongdoer is answerable for such consequences as flow directly from the act, and are such as a reasonable man should anticipate would probably result from the act first committed. Judge Cooley, in his work on Torts (Volume 1 [3rd Ed.], p. 99), with characteristic exactness, has summarized the rule as follows:

"'It is not only requisite that damage, actual or inferential, should be suffered, but this damage must be the legitimate sequence of the thing amiss. **The maxim of the law here applicable is that in law the immediate, and not the remote, cause of any event is regarded, and in the application of it the law rejects, as not constituting the foundation for an action, that damage which does not flow proximately from the act complained of.** In other words, the law always refers the injury to the proximate, not to the remote, cause. The explanation of this maxim may be given

thus: If an injury has resulted in consequence of a certain wrongful act or omission, but only through or by means of some intervening cause, from which last cause the injury followed as a direct and immediate consequence, the law will refer the damage to the last or proximate cause, and refuse to trace it to that which was more remote. The chief and sufficient reason for this rule is to be found in the impossibility of tracing consequences through successive steps to the remote cause, and the necessity of pausing in the investigation of the chain of events at the point beyond which experience and observation convince us we cannot press our inquiries with safety. To the proximate cause we may usually trace consequences with some degree of assurance, but beyond that we enter a field of conjecture, where the uncertainty renders the attempt at exact conclusions futile. A writer on this subject has stated the rule in the following language: If the wrong and the resulting damage are not known by common experience to be naturally and usually in sequence, and the damage does not, according to the ordinary course of events, follow from the wrong, then the wrong and the damage are not sufficiently conjoined or concatenated as cause and effect to support an action.'

"As a corollary to this postulate he says (p. 101):

" 'When the act or omission complained of is not in itself a distinct wrong, and can only become a wrong to any particular individual through injurious consequences resulting therefrom, this consequence must not only be shown, but it must be so connected by an averment and evidence with the act or omission as to appear to have resulted therefrom accord-

ing to the ordinary course of events, and as a proximate result of a sufficient cause.'

"The Court of Appeals of Pennsylvania, in Hoag et al. v. Lake Shore & Michigan Southern Railroad Company, 85 Pa. 293, 27 Am. Rep. 653, has applied this better rule. In that case the plaintiff owned an oil lease near the defendant's railroad track, where it ran along the bank of Oil Creek at the base of a high hill. A slide of earth and rocks during a rainstorm came down the hillside, lodging on defendant's track. A train of cars of the defendant, loaded with crude petroleum, ran into this slide, whereby the train was derailed and the petroleum ignited by fire from the engine. The ignited oil ran into the creek and was carried downstream some 300 or 400 feet, setting fire to the plaintiff's building, destroying it. It was held that the plaintiff could not recover because the destruction of the building was not the proximate cause of the defendant's imputed negligence. The Court said:

"'A man's responsibility for his negligence and that of his servants must end somewhere. There is a possibility of carrying an admittedly correct principle too far. It may be extended so as to reach the reductio ad absurdum, so far as it applies to the practical business of life. * * * The true rule is that the injury must be the natural and probable consequence of the negligence—such a consequence as, under the surrounding circumstances of the case, might and ought to have been foreseen by the wrongdoer as likely to flow from his act. This is not a limitation of the maxim, "Causa proxima non remota spectatur." It only affects its application. * * * It

would be unreasonable to hold that the engineer of the train could have anticipated the burning of the plaintiff's property as a consequence likely to flow from his negligence in not looking out and seeing the landslide. The obstruction itself was unexpected. * * * The probable consequences of the collision, such as the engineer would have a right to expect, would be the throwing of the engine and a portion of the train off the track. Was he to anticipate the bursting of the oil tanks, the oil taking fire, the burning oil running into and being carried down the stream, and the sudden rising of the waters of the stream, by means of which, in part at least, the burning oil set fire to the plaintiff's building? This would be a severe rule to apply, and might have made the defendant responsible for the destruction of property for miles down Oil Creek. * * * It is manifest that the negligence was the remote and not the proximate cause of the injury to the plaintiff's building.'

"In S. S. Pass Railway Co. v. Trich, 117 Pa. 390, 11 Atl. 627, 2 Am. St. Rep. 672, the plaintiff was upon the rear platform of a street car and about to enter the same when the driver whipped up the horse to avoid a collision with a runaway horse and carriage. The abrupt jolt threw the plaintiff to the ground, when he was struck by the runaway and injured. The Court held that a verdict for the defendant should have been directed. The Court, through Mr. Justice Green, said:

" 'The utmost that can be said would be that such a consequence might possibly happen. But things or results which are only possible cannot be spoken of as either probable or natural. For the latter are those things or events which are likely to happen and

which for that reason should be foreseen. Things which are possible may never happen, but those which are natural or probable are those which do happen, and happen with such frequency or regularity as to become a matter of definite inference. To impose such a standard of care as requires, in the ordinary affairs of life, precaution on the part of individuals against all the possibilities which may occur, is establishing a degree of responsibility quite beyond any legal limitations which have yet been declared.'

"In Stone v. Boston & A. R. Company, 171 Mass. 536, 51 N. E. 1, 41 L. R. A. 794, the railroad company negligently stored oil upon a station platform. A teamster, not an employe, went to the platform to deliver goods and dropped a match on the platform, causing a fire, which finally communicated to the plaintiff's building, about 75 feet from the point of origin of the fire. The Court held the damages not proximate, and said:

" 'Was the starting of the fire by Casserly the natural and probable consequence of the defendant's negligent act in leaving the oil upon the platform? According to the usual experience of mankind, ought this result to have been apprehended? The question is not whether it is a possible consequence, but whether it was probable; that is, likely to occur, according to the usual experience of mankind. That this is the true test of responsibility, applicable to a case like this, has been held in many cases, according to which a wrongdoer is not responsible for a consequence which is merely possible, according to occasional experience, but only for a consequence which is probable, according to ordinary and usual experi-

ence. One is bound to anticipate and provide against what usually happens and what is likely to happen, but it would impose too heavy responsibility to hold him bound in like manner to guard against what is unusual and unlikely to happen, or what, it is sometimes said, is only remotely or slightly probable. A high degree of caution might, and perhaps would, guard against injurious consequences which are merely possible, but it is not negligence, in a legal sense, to omit to do so.'

"Accordingly, in Gibson v. International Trust Company, 177 Mass. 100, 58 N. E. 278, 52 L. R. A. 928, the janitor of the defendant's building, while riding in the elevator, carelessly moved the stool of the elevator boy, who, not aware thereof, when he attempted to sit down, lost his balance, and, in saving himself from falling, clutched at the elevator lever, which started the elevator and injured a passenger. It was held that the act of the elevator boy in clutching the lever was the proximate cause of the injury and not the act of the janitor in removing the stool.

"Mr. Justice Miller, in Insurance Company v. Tweed, 7 Wall. 44, 19 L. Ed. 65, after adverting to the rule of proximate and remote cause, said:

" 'One of the most valuable of the criteria furnished us by these authorities is to ascertain whether any new cause has intervened between the fact accomplished and the alleged cause. If a new force or power has intervened, of itself sufficient to stand as the cause of the misfortune, the other must be considered as too remote.'

"In Milwaukee & St. Paul Railway Company v. Kellogg, 94 U. S. 469, 475, 24 L. Ed. 256, Mr. Justice Strong declared the rule as follows:

" 'The question always is: Was there an unbroken connection between the wrongful act and the injury, a continuous operation? Did the facts constitute a continuous succession of events, so linked together as to make a natural whole, or was there some new and independent cause intervening between the wrong and the injury? It is admitted that the rule is difficulty of application. But it is generally held that, in order to warrant a finding that negligence, or an act not amounting to wanton wrong, is the proximate cause of an injury, it must appear that the injury was the natural and probable consequence of the negligence or wrongful act, and that it ought to have been foreseen in the light of the attending circumstances.'

"In Insurance Company v. Boon, 95 U. S. 117, 130, 24 L. Ed. 395, Mr. Justice Strong again recognized the principle that 'when the causes are independent of each other, the nearest is, of course, to be charged with the disaster.'

"In Scheffer v. Railroad Company, 105 U. S. 249, 26 L. Ed. 1070, the executors of Charles Scheffer brought suit against the defendant railroad company for the death of said Scheffer, alleged to have resulted from a collision of railway trains, due to defendant's negligence. As a result thereof said Scheffer became disordered in mind and body, his brain and spine were affected, whereby his reasoning powers became impaired, and in eight months thereafter, as a consequence of illusions and forebodings over his condition, he committed suicide. It was held that the negligent act of the railroad company was not the proximate cause of Scheffer's death. After reaffirming the rule laid down in Railroad Company v. Kellogg, supra, Mr. Justice Miller said:

" 'Bringing the case before us to the test of these principles, it presents no difficulty. The proximate cause of the death of Scheffer was his own act of self-destruction. It was within the rule * * * a new cause, and a sufficient cause of death.

" 'The argument is not sound which seeks to trace this immediate cause of death through the various stages of mental aberration, physical suffering and eight months disease and medical treatment to the original accident on the railroad. Such a course of possible or even logical argument would lead back to that "great first cause least understood," in which the train of all causation ends.

" 'The suicide of Scheffer was not a result naturally and reasonably to be expected from the injury received on the train. It was not the natural and probable consequence and could not have been foreseen in the light of the circumstances attending the negligence of the officers in charge of the train.'

"Without adverting to the accordant decisions of state and federal courts in other jurisdictions, it is sufficient to say that the rule above declared has been recognized and applied in this circuit (Railway Company v. Elliott, 55 Fed. 949, 5 C. C. A. 347, 20 L. R. A. 582). In the more recent case of Cole v. German Savings & L. Association, 124 Fed. 113, 59 C. C. A. 593, 63 L. R. A. 416, known as the 'Elevator Case,' the facts of which are quite familiar, Judge Sanborn reaffirmed the rule expressed in the syllabus:

" 'An injury that results from an act of negligence, but that could not have been foreseen or reasonably anticipated as its probable consequence, and that probably would not have resulted from it, had not the interposition of some new and independent cause

interrupted the natural sequence of events, turned aside their course and produced it, is not actionable, and such an act of negligence is the remote cause, and the independent intervening cause is the proximate cause of the injury.'

"A discriminating observance of the foregoing distinction between the proximate and remote cause would have prevented some confusion in the authorities, and greatly simplified the solution of seemingly complicated facts of the particular case."

In **Graeff v. Philadelphia R. R. Co.**, 161 Pa. St. 230, 6 American Negligence Cases, p. 376, a person, after alighting from a train, passed through the depot, and when she reached the street door, which was entirely of wood and swung both ways, it was pushed violently open by a person coming in and the passenger was struck by it and injured in the forehead by a small screw-eye, used to fasten the door back when the weather was warm. The Court held there was no negligence on the part of the defendant. This case is of such importance that we deem it important to report same in its entirety:

"Green, J. The act which caused the plaintiff's injury was not the act of the defendant nor of any of its agents or employes. It was exclusively the act of a total stranger, over whom, or whose actions, the defendant had not the slightest control. Moreover, his action was not the usual, customary conduct of an intending passenger about to pass through the door in question, but it was rude, impatient and unusual. The plaintiff herself thus describes the man-

ner of her injury. Having said she was just about going out of the door and had her hand up at the door and her left foot on the pavement, she was asked: 'Q. Where was the right foot? A. On the step, and going out there was a gentleman walked in or came running to make the train, and as he ran in he knocked the door against my head. Q. Where did he hit your head? A. He struck me right there on the forehead.'

"The plaintiff's witness, Emma Bettker, being the only other witness who described the manner of the injury, testified as follows upon the same subject: 'As we were going out of the door to go out, while two gentlemen came running in and threw the door on Nora, and we were still going to pass out when there was a gentleman coming from the depot says, "Why, Miss, he has broken the skin, you had better go in."' The foregoing is the whole of the testimony descriptive of the injury except the plaintiff's cross-examination, which is substantially similar to the testimony in chief.

"It is manifest, therefore, that the plaintiff's injury was exclusively the result of the unusual, rude and hasty act of a stranger. Dealing with just such a question as this in the case of Ellinger v. Phila. W. & Balt. R. R. Co., 153 Pa. St. 215 (1), we held that a common carrier is not bound to protect its passengers from rudeness or bad manners on the part of strangers or other passengers, unless such conduct amounts to a breach of the peace. A woman is not entitled to recover damages from a railroad company for personal injuries where it appears from her own testimony that when she was about to descend from the lower step of a car to the ground she was jostled

off by another passenger rudely pushing by her to enter the car. Our Brother Williams, delivering the opinion, said: 'She had reached the lowest step and was in the act of stepping from it to the platform when an impatient man, desiring to take the train at that station, stepped up on the step she was leaving, and in so doing crowded or jostled her, and she fell. The immediate cause of her fall was the act of the impatient man in his efforts to get upon the car. * * * But protection against bad manners is not, so far as I am aware, one of the duties owing by a carrier to its passengers. Rudeness is a breach of no positive law. The ordinary cars are, and must be, open to the masses, among whom there will be different degrees of intelligence and politeness; differences in physical vigor and temperament. There is, therefore, necessarily a certain amount of rudeness, of haste, of selfish disregard of the nerves and of the comfort of others to be met with wherever men and women congregate, whether upon railroad trains, in places of amusement, or upon the streets of a city. Unless such conduct amounts to a breach of the peace the officers of the law can take no cognizance of it, and carriers are not bound to prevent it or liable in damages for its appearance about their stations or trains. The plaintiff was the victim of an act of rudeness.'

"All of this language is precisely applicable to the present case. An impatient traveler, in a hurry to make a train, rushes ahead heedlessly, pushes the door open violently and causes the door to strike the plaintiff with force, and injures the plaintiff. It was an act of rudeness of which the plaintiff was the victim. That the stranger was responsible for his act there can be no doubt, but that the defendant shall

be made to suffer in damages for such an act is intolerable and unjust to the last degree. It is subject to no duty to guard against such acts, and therefore it is not negligent in that regard.

"But, says the plaintiff, the defendant is negligent in the construction of the door and therefore should be liable. A couple of carpenters are examined who, after the event, say the door was defective because it was not all glass above the middle rail, so that persons could see each other coming to the door. It is not at all certain that the same accident would have been avoided if this door had been built in that way, because the same spirit of impatience and rudeness would have prompted the same act of haste in opening the door to get through quickly, although another person was visible on the other side.

"But the best illustration of the fallacy of the attempt to establish negligence in this way is afforded by one of our own cases, Hayman v. Penn R. R. Co., 118 Pa. St. 508 (1). There the door for the transit of the passengers from the wharf to the boat was constructed precisely as the carpenters said this one should have been, viz., all glass above the middle rail. But it happened that a passenger going through it just behind another passenger put up his hand to push it open and he struck the glass with force enough to break it, and, his hand having been cut severely by the broken glass, he brought an action against the company and sought to recover upon the presumption of negligence arising from the mere fact of the accident. But we refused to sanction that proposition and held that the door was no part of the machinery used for the carriage of passengers, and that the plaintiff, in order to recover, must prove neg-

ligence affirmatively. In that case the accident resulted from the presence of too much glass in the door, and in this case it was contended there was too little. But both contentions were untenable. The doors were both such as are in common use, and the mere construction of neither of them justified an inference of negligence. The present case is much stronger than the Hayman case because in that the injury was the result of the mere ordinary use of the door, while here it was the result of the violent act of a stranger.

"Again, it is contended that the presence of a small screw-eye on the inner surface of the door was the immediate means by which the injury was inflicted, and therefore it was negligence to have it in a position where it could strike the plaintiff's head. There was no proof that such an appliance was not a usual and suitable device for holding the door open when the weather did not require it to be closed, but it was contended it should have been at the top or bottom of the door so that it could not have hurt the plaintiff. It was a very small screw-eye and only projected nine-sixteenths of an inch beyond the surface. It was located four feet and ten inches from the bottom of the door and it happened that the plaintiff was of a sufficiently short stature to bring her head on the level with this little appliance. It is a sufficient reply to the argument derived from this source to say that if the eye had been at the bottom of the door it might have struck her ankle and injured her, as was the fact in the case of Kies v. Erie City, 135 P. St. 144. There the plaintiff, who was a woman also, was passing along the street in front of an engine house when the door, which projected when

open six feet over the pavement, was suddenly thrown open and struck the plaintiff on the ankle and injured her seriously. She brought an action against the city for the injury, but the court below granted a nonsuit, which this Court sustained. It was claimed that the building was negligently constructed as to the doors and therefore the city was liable, but we held otherwise. Mr. Chief Justice Paxson said in the opinion: 'It is true the doors of the engine house opened outwards and were operated by springs, which, when certain bolts were pulled, opened, or assisted in opening, the doors. The case was argued upon the theory that when the bolts were pulled the springs opened the doors suddenly and with great violence.

"'In such case, as they swept across a considerable portion of the pavement in opening, it can readily be seen that they might be a dangerous trap to injure persons passing along the said pavement. The only testimony on the part of the plaintiff upon this subject was substantially as follows: "When the bolts are pulled out you have to start the doors a little bit, and then the spring takes hold and helps swing the door open. Sometimes they are opened quick and sometimes not so quick. If the wind is blowing it is difficult and you have to follow the door and push it along, and when there is no wind they swing freely." As the plaintiff was nonsuited, she is entitled to all the deductions which can fairly be drawn from this evidence. Tested by this rule, however, it is not sufficient to justify in finding that the doors of the engine house were defectively constructed and dangerous to citizens using the pavement. It is evidence that the only object and effort of the springs was to

aid the firemen in swinging open the heavy doors. It is not only possible, but probable, that on the occasion referred to, if the door was opened rapidly and violently, as contended by the plaintiff, it was the result of a push by the person who opened it. For his carelessness or negligence the city, under all the authorities, is not liable, and we have already said there was not sufficient evidence of the faulty construction of the building to submit to the jury.'

"Just so in the present case. The defendant is not responsible for the act of the stranger in pushing open the door in a rude and violent manner. If it had been opened in the ordinary and usual manner the plaintiff would not have been hurt. **BUT THE DEFENDANT IS NOT BOUND TO TAKE PRECAUTIONS AGAINST THE UNUSUAL AND NEGLIGENT USE OF ITS APPLIANCES BY STRANGERS OR OTHERS. IF THEY ARE REASONABLY SAFE WHEN USED WITH ORDINARY CARE AND IN THE MANNER THAT PREVAILS WITH THE MASS OF MANKIND, THE DUTY OF THE PARTY WHO SUPPLIES THEM IS PERFORMED.**

"A very apt illustration of this doctrine is found in the case of Eisenbrey v. Penna. Co., 141 Pa. St. 566. There a fence was erected enclosing the front steps of a residence and having a door therein extending, when wide open, ten inches beyond the limit within which obstructions were permitted by a city ordinance. The plaintiff, an old man, 69 years of age, was passing along the foot-walk in front of the house, when suddenly the door or gate in the fence was thrown open and struck him, causing him to fall and suffer a fracture of his thigh. A verdict was recovered in the court below, but we reversed the judg-

ment without a venire. We said: 'The accident did not result from the erection of the fence. That was harmless enough, and, if in violation of the city ordinance, which does not clearly appear, was not necessarily dangerous or likely to injure anyone. **The proximate cause of the injury to the plaintiff was the throwing open of the door suddenly.** It was not contended that this was done by the company or by any agent, employe or servant thereof. There is no room, therefore, to apply the doctrine of respondeat superior.'

"All of this is exactly pertinent to the present contention. For the rude and hasty act of the stranger the defendant is not responsible.

"The screw-eye was a perfectly proper appliance to be upon the door to fasten it back. In itself it was entirely innocent and was not by any means so prominent as the knob of a door or an outside lock or a key projecting therefrom. In all the ordinary uses of the door there was not the least liability to inflict injury resulting from its presence. It is not possible to regard it as any more, nor even as much, a source of danger as a projecting knob or lock or key, or even a piece of carving or an old-fashioned knocker. We are perfectly clear that the mere presence of such an appliance on the surface of a door is not the least evidence of negligence in the construction of the door, and the same is true of the glass plate.

"Upon the whole testimony we are of opinion that the case should have been withdrawn from the jury with a binding instruction to find a verdict for the defendant. We sustain the fifth, sixth, seventh and

eighth assignments of error. The others are immaterial.

"Judgment reversed."

In **Smith v. Johnson**, L. R. A., 1915-F, 572, the following occurs (219 Mass. 142):

"De Courcy, J., delivered the opinion of the Court.

"The forefinger of the plaintiff's left hand was crushed by the swinging door at the entrance to the retail dry goods store of the defendants in Boston. This was the center one of three single doors between the vestibule and the store, was made of plate glass with a border of wood at the top, bottom and sides, and was about seven feet high, two and one-half feet wide and three inches thick. The hinges were of a type that permitted it to be pushed open in either direction.

"As the plaintiff was about to go from the vestibule into the store another person passed ahead of her and pushed the door open. As it swung back she put up her hand to shield her head and glasses and apparently her forefinger projected beyond the edge of the door and was caught between the edge and the door frame.

"We are of the opinion that the record discloses no negligence on the part of the defendants. The doors as described by the testimony and shown by the photographs were of ordinary construction and were substantially like those in general and common use for many years in Boston and elsewhere. There was nothing to show that they were not entirely safe when properly used by persons passing through them. **IF,**

AS THE PLAINTIFF'S SOMEWHAT CONFUSED TESTIMONY INDICATES, THE ORDINARY SPEED OF THE DOOR WAS INCREASED BY ANOTHER CUSTOMER NEGLIGENTLY PUSHING IT TOWARD HER, THE DEFENDANTS ARE NOT RESPONSIBLE THEREFOR, AND, ASSUMING IN THE PLAINTIFF'S FAVOR THAT THERE WAS ONLY THE USUAL RECOIL OF THE DOOR, THE FAILURE TO FURNISH DOORKEEPERS OR ATTENDANTS IN NO WAY CONTRIBUTED TO THE ACCIDENT. It appears that there was no pushing or jostling by the crowd of Christmas shoppers. In short, the evidence fails to disclose the breach of any legal duty which the defendants owed to the plaintiff (Hunnewell v. Haskell, 174 Mass. 557, 55 N. E. 320, 7 Am. Neg. Rep. 53; Lord v. Sherer Dry Goods Co., 205 Mass. 1, 27 L. R. A. [n. s.] 232, 137 Am. St. Rep. 420, 90 N. E. 1153, 18 Ann. Cas. 41; Dolan v. Callender, McA. & T. Co., 26 R. I. 198, 58 Atl. 655, 17 Am. St. Rep. 126; Pardington v. Abraham, 93 App. Div. 359, 87 N. Y. Supp. 670, affirmed in 183 N. Y. 553, 76 N. E. 1102).

"The plaintiff's testimony leaves largely to conjecture the explanation of how her finger happened to get between the door and the frame when the door swung toward her. Whether it would warrant the jury in finding that she was in the exercise of due care, however, need not be determined in view of her failure to establish the other necessary element in her case. (See Green v. Tarr, 207 Mass. 111, 92 N. E. 1003.) In accordance with the report, the entry must be:

"Judgment for the defendants on the verdict."

For the reasons above assigned, The May Department Stores Company, one of the defendants in error, respectfully submits that there existed in said cause a separable controversy between the plaintiff in error and the said defendant in error which authorized the removal of said cause to the Federal Court, and that the lower Court committed no error in overruling the motion to remand filed by plaintiff in error.

Respectfully submitted,

ROBERT A. HOLLAND, JR.,
JACOB M. LASHLY,
Attorneys for The May Department Stores Company, one of the defendants in error.